Notes

The Sexual Segregation of American Prisons*

Despite recurrent interest in both penal reform and women's rights, little attention has been given to the differential treatment of male and female inmates in American prisons.[1] This Note examines those differences and assesses their constitutionality in light of the Fourteenth and proposed Equal Rights Amendments.[2]

* The research for this Note was financed by a Travel and Study Grant from the Ford Foundation.

1. For example, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967) overlooked female institutions almost entirely. Walter Reckless and Barbara Ann Kay did submit a report to the Commission on female delinquency and crime, but it was not included in its final report.

The most recent comprehensive survey of correctional facilities for women is J. LEKKERKERKER, REFORMATORIES FOR WOMEN IN THE UNITED STATES (1931). This work has been updated only by an unpublished dissertation, K. Strickland, Correctional Institutions for Women in the United States, June, 1967 (Ph.D. dissertation, Syracuse University, available through University Microfilms, Ann Arbor, Michigan). Published works on women's prisons during the last decade have focused on sociological descriptions of a single institution. *See, e.g.*, R. GIALLOMBARDO, SOCIETY OF WOMEN: A STUDY OF A WOMEN'S PRISON (1966); D. WARD & G. KASSEBUM, WOMEN'S PRISON: SEX AND SOCIAL STRUCTURE (1965).

2. Data for this Note was obtained in three ways. First, information on correctional institutions was solicited from the corrections department of every state and the U.S. Bureau of Prisons. Second, personal visits were made to the women's prisons of nine states (see below) and to the federal correctional institutions at Danbury, Connecticut, Fort Worth, Texas, Terminal Island, California, and Alderson, West Virginia. All interviews took place at the institutions referred to in the interview citation, unless another location is specified. Finally, fifteen sample states were chosen on the basis of size and geographic location. Selected institutions in these states were then surveyed through telephone interviews [hereinafter cited as *Survey*]. The survey encompassed the following forty-seven male and fifteen female institutions, which account for approximately thirty percent of the men and fifty percent of the women incarcerated in prisons throughout the United States:

State	*Institution*	*1971 Population*
Alabama	Frank Lee Youth Center	60
	Atmore Prison Farm	90
	Draper Correctional Center	600
	Holman Unit	800
	†*Julia Tutwiler Prison for Women	120
California	State Prison, San Quentin	3624
	State Prison, Folsom	2356
	California Correctional Institution	1189
	California Institution for Men	2899
	†*California Institution for Women	739
Connecticut	Correctional Institution, Cheshire	332
	Correctional Institution, Somers	927
	Correctional Institution, Osborn	337
	†*Correctional Institution, Niantic	147

State	*1971 Population*	*Institution*
Illinois	State Penitentiary, Stateville	2516
	State Penitentiary, Menard	1492
	State Penitentiary, Pontiac	1222
	†*State Reformatory for Women, Dwight	147
Indiana	Indiana State Prison	1850
	Indiana State Reformatory	2164
	Indiana State Farm	1139
	*Indiana Women's Prison	129
Michigan	Michigan Reformatory, Ionia	1221
	State Prison of Southern Michigan Jackson	4150
	†*Detroit House of Correction	326
Minnesota	State Prison	931
	State Reformatory	653
	†*Women's Reformatory	55
Mississippi	†Parchman (male section)	1700
	†*Parchman (female section)	50
Missouri	State Penitentiary for Men	1600
	Training Center for Men	720
	Intermediate Reformatory	460
	*State Correctional Center for Women	86
Nebraska	Penal and Correctional Complex	974
	*State Reformatory for Women	44
New York	Elmira Correctional Facility	1075
	Green Haven Correctional Facility	2090
	Wallkill Correctional Facility	408
	Clinton Correctional Facility	2045
	†*Bedford Hills Correctional Facility	330(a)
Ohio	Marion Correctional Institution	1168
	Lebanon Correctional Institution	1368
	Chillicothe Correctional Institution	1100
	Southern Ohio Correctional Institution	1017(b)
	Ohio Reformatory	2241
	*Ohio Women's Reformatory	312
Oregon	Oregon State Penitentiary	1214
	State Correctional Institution	460
	†*Women's Correctional Center	63
Pennsylvania	Huntingdon Correctional Institution	905
	Camp Hill Correctional Institution	1024
	Dallas Correctional Institution	588
	Graterford Correctional Institution	1616
	Rockview Correctional Institution	633
	Pittsburgh Correctional Institution	982
	Regional Correctional Facility	129
	*Muncy Correctional Institution	143
Washington	State Reformatory	686
	State Penitentiary	1304
	Corrections Center, Shelton	193
	†*Purdy Treatment Center for Women	104(a)

Source: The American Correctional Association, Directory, Correctional Institutions and Agencies, 1971 [hereinafter cited as *ACA Directory*].
†personal visits
*women's institutions
(a) Population as of July 18, 1972. The Albion institution was closed and its population sent to Bedford Hills after the printing of the 1971 *ACA Directory*. *See* note 16 *infra*. The Purdy institution was constructed after printing.
(b) Population as of March 12, 1973. The Southern Ohio Institution was constructed after the printing of the 1971 *ACA Directory*.

In most respects, each state and the federal government operates two separate prison systems[3]—one for men, the other for women.[4] In part, the differences between those systems are related to their vastly different scales. Of the nearly 200,000 inmates in state and federal prisons, less than 6,000 are women.[5] Since neither the states nor the federal government have established optimal population levels for their institutions, prisons which house men tend to have substantially greater populations than those for women.[6] Such size disparities lead to differences in treatment and to the predictably distinct atmospheres that characterize large and small institutions.

The fundamental decision to segregate which created these scale differences has undoubtedly been based at least in part on stereotypical assumptions[7] about the different security and rehabilitative problems posed by male and female inmates. Institutions which house members of only one sex can be structured and operated in accordance with these perceived differences.[8] Segregation also prevents equalizing at the margin and eliminates pressure for standardized treatment.[9] Scale differences, in turn, often reinforce this tendency toward sexually stereotyped prison programs.[10]

I. The Dual System in Operation

A. *Differences Caused by Scale*

Prison systems reflect scale disparities in two ways: 1) women's in-

3. This Note deals primarily with adult prisons. Jails and juvenile institutions are not considered.

4. The Federal Correctional Institution at Fort Worth, Texas is the only truly "integrated" adult facility in the country. The Pennsylvania women's institution at Muncy, *Survey, supra* note 2, and the Massachusetts women's institution at Framingham, N.Y. Times, April 12, 1973, at 51, col. 1, have begun to take male inmates, but thus far few men have been admitted. In the few other states where women prisoners are technically housed in the same institution as male prisoners, they are held in separate units of those institutions, with little or no mixing of the populations. This is the case, for example, in Florida, Mississippi, and New Mexico. *ACA Directory, supra* note 2, at 55-56.

5. In December, 1970, there were 190,794 men and 5,635 women in the nation's correctional institutions. U.S. DEPT. OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 6 (Nat. Prisoner Statistics, Bull. No. 47, 1971). The ratio is approximately thirty-four men to every woman.

6. *See* note 11 *infra.*

7. Such stereotyping consists of treating *all* members of a sex as if they possessed certain physical or mental attributes perceived, accurately or not, as typical of that sex.

8. *See* pp. 1239-40 & note 72 *infra.*

9. Even assuming that *most* male and female inmates possess different treatment needs, incarceration in a sexually integrated facility would insure that those few inmates requiring (or desiring) programs normally offered to the opposite sex would have equal access to such opportunities.

10. Thus, for example, smaller institutions are more conducive to individualized treatment and private rooms; larger institutions can support a broader range of vocational programs and less costly custodial supervision.

stitutions have smaller populations;[11] and 2) there are fewer, and by necessity more widely separated, institutions for women.[12] These factors have generated a variety of treatment differentials, particularly with regard to the remoteness of each institution, the heterogeneity of its population, and the level of its institutional services.

1. *Remoteness*

The relatively small number of women's prisons results in what might be termed a "remoteness" disadvantage. This factor is most striking in the eight states that do not maintain any institution for the incarceration of women felons. These states consider it uneconomical to provide facilities for their relatively small female felon populations and instead make arrangements with neighboring states to "board" them.[13]

11. The states in the sample displayed the following population patterns in 1971:

	Men's Institutions		*Women's*
State	*Average*	*Range*	*Institutions*
Alabama	447	60 -900	120
California	2337	1037-3624	739
Connecticut	532	332 -927	147
Illinois	1079	180 -2516	147
Indiana	1313	1139-2164	129
Michigan	1287	250 -4150	326
Minnesota	792	653 -931	55
Mississippi	1700	single prison	50
Missouri	927	460 -1600	86
Nebraska	974	single prison	44
New York	1339	408 -2090	330
Ohio	1610	1100-2260	312
Oregon	837	460 -1214	63
Pennsylvania	854	129 -1616	143
Washington	926	597 -1304	104

Source: *ACA Directory, supra* note 2.
In twelve of the fifteen sample states, the one women's facility has a smaller inmate population than *any* of the male institutions in the state. Moreover, in two of the three exceptions, the smaller male institution houses only youthful offenders. *See* note 22 *infra.*

12. The 1971 *ACA Directory, supra* note 2, lists approximately forty state institutions for women, approximately 250 for men. Similarly, there are three federal institutions for adult women, twenty-three for men. *See* note 14 *infra.*

13. Idaho sends convicted women to Oregon; New Hampshire, Rhode Island, and Vermont incarcerate theirs in Massachusetts; Montana, North Dakota, and Wyoming send theirs to Nebraska. Until recently, South Dakota had also been contracting with Nebraska, but has now opened its own women's correctional unit at its state Mental Health Institution.

Hawaii provides a striking example of this "boarding out" procedure. Women sentenced to more than two years are sent to mainland prisons (usually in California or one of the federal institutions). Since men are only sent to the mainland if they have special security or treatment needs that cannot be met in Hawaii's three men's institutions, this 2,500 mile distance burden falls primarily on female offenders. Interview with Arthur F. Lykke, Assistant Administrator of the Corrections Division, Hawaii Department of Social Services and Housing, Aug. 15, 1972, on file with the *Yale Law Journal.*

These problems may become more acute as economic considerations force the consolidation of the nation's smaller women's prisons. For example, consideration is presently

Remoteness is also significant in those states which have more than one male institution and incarcerate men in the institution nearest their homes.[14] In New York, for example, a number of the correctional facilities house male convicts in their geographical district.[15] No state, however, operates more than one institution for the incarceration of women.[16]

Some administrators contend that the comparative remoteness of women's institutions is not completely disadvantageous. They note that isolation can provide an opportunity for reorientation away from the inmate's former environment.[17] But most administrators and incarcerated women agree that this theoretical advantage is far outweighed by the real disadvantages of remoteness.[18] The woman inmate is normally farther from her community, family, friends, and attorney than her male counterpart.[19] She may experience greater difficulty in keeping track of her family or possessions, in communicating with her lawyer during any post-conviction legal action, and in gaining access to her parole board.[20] She may also be reluctant to participate in a work-

being given to incarcerating all female inmates from the six New England states in a single institution. Working paper submitted by Katherine Strickland, on file with the *Yale Law Journal*. *See also* note 16 *infra*.

14. This disadvantage is also present in the District of Columbia and federal systems. *See* 118 CONG. REC. E 6636 (daily ed. May 22, 1972):

> Long-term female offenders are housed at the Federal Reformatory at Alderson, West Virginia, more than 250 miles from their communities and their families. The overcrowded and understaffed prison at Alderson currently houses approximately 60 District women, about 11% of the inmate population. The warden of Alderson testified to the Commission that it is virtually impossible to provide adequate rehabilitative services for the District inmates because they are out of contact with their families and their home community.

In the federal system, there are only three institutions for adult women: Alderson, West Virginia, Terminal Island, California, and Fort Worth, Texas; but twenty-three institutions for adult men. *ACA Directory, supra* note 2. *See* notes 27 & 28 *infra*.

15. *Survey, supra* note 2. Illinois, Ohio, Pennsylvania, and California administrators also reported that their male convicts are assigned to institutions at least partially on the basis of geographic location. *Id.*

16. *ACA Directory, supra* note 2. For many years New York did maintain female correctional institutions at both Bedford Hills and Albion, but the Albion facility was closed recently for economic reasons. Interview with Janice P. Warne, Superintendent, Bedford Hills Correctional Facility, July 6, 1972, on file with the *Yale Law Journal*.

17. *See, e.g.*, interview with Virginia McLaughlin, Warden, Federal Correctional Institution at Alderson, June 27, 1972, on file with the *Yale Law Journal*.

18. *See* District of Columbia Commission on the Status of Women, Female Offenders in the District of Columbia, 1972, reprinted in 118 CONG. REC. E5535, E5536 (daily ed. May 22, 1972). This point was echoed in the interviews with Warne, *supra* note 16, and Virginia Carlson, Superintendent, California Institution for Women, Aug. 9, 1972, on file with the *Yale Law Journal*.

19. The remoteness hardship also falls on the family of a convicted female, particularly on children for whom she may have been the sole support. *See* The Women's Prison Association, A Study in Neglect: A Report on Women Prisoners, Dec. 6, 1972, at 2, on file with the *Yale Law Journal*. *See also* note 16 *supra*.

20. In Hawaii, for example, the Hawaii Parole Board determines the release date of women kept on the mainland, but does not give them a parole interview. Hawaii's male felons incarcerated in one of the Islands' three men's institutions are interviewed. Interview with Lykke, *supra* note 13.

or study-release program, knowing that she probably will be unable to continue once she is released and returns to her home.[21]

2. *Heterogeneity*

Typically, male prisons are "classified,"[22] with different institutions for different categories of offender.[23] By contrast, each state's one female prison must be responsible for the entire range of female felons and frequently misdemeanants as well.[24] Thus, in most states, the inmate population at the female institution is more diverse in terms of offense, sentence, and age than the populations at corresponding male institutions.[25]

This heterogeneity affects all aspects of institutional life, including prison programs, security arrangements, and administrative policies. When a prison's population is homogeneous, it can gear its overall program to that population's particular rehabilitative needs and security requirements. But when the population is diverse, the program will necessarily be something of a compromise, particularly when resources are limited.[26]

21. Interviews with Lykke, *supra* note 13, and Milton Burns, Associate Superintendent, Purdy Treatment Center for Women, August 17, 1972, on file with the *Yale Law Journal.*

22. Only nine states have only one institution for men: Arizona, Arkansas, Idaho, Mississippi, Montana, New Hampshire, Nebraska, Utah, and Wyoming. *ACA Directory, supra* note 2. Of the remaining states, virtually all classify their institutions according to various categories of male offenders. These institutions may be divided along geographic or offender lines, or both. For example, twenty-one states and the District of Columbia have separate institutions for young or first-time male offenders. *ACA Directory, supra* note 2. It is interesting to note that a state with as small a population as Nevada has both a maximum and medium security prison for men. *ACA Directory, supra* note 2, at 50.

23. This "sorting" is done by sex-separate classification structures. That is, different facilities are maintained for the classification of males and females. In many states (*e.g.,* Alabama, Illinois, Ohio, and New York) all male admissions go first to a central "diagnostic center" and from there are assigned to one of the state institutions for men. The women, however, generally go directly to the women's institutions for classification. *Survey, supra* note 2.

24. *See ACA Directory, supra* note 2. Connecticut provides an extreme example. Niantic (the women's prison) is the only state facility for detaining women overnight. Its population ranges from pre-trial detainees to women serving life terms. Interview with correctional counselor, Connecticut Correctional Institute, June 7, 1972, on file with the *Yale Law Journal.* On the other hand, Connecticut maintains six "Community Correctional Centers" (jails), three correctional institutions, and a conservation camp for males. *ACA Directory, supra* note 2, at 12-13.

Texas provides a good example of the considerable classification advantages enjoyed by men in the larger states. While there is only one correctional facility for women, the Texas male prison system includes separate institutions for older first-offenders, recidivists under twenty-five, physically and mentally weak recidivists, and pre-release inmates; two institutions primarily for recidivists over twenty-five; a diagnostic institution; and a treatment center for the physically or mentally handicapped. *ACA Directory, supra* note 2, at 83-85.

25. *See* Strickland, *supra* note 1, at 81. It is, of course, possible that female offenders are not as diverse a group as the entire spectrum of male offenders; yet it is clear that states which segregate their young male first-offenders cannot insure that their corresponding female inmates do not come into contact with at least some habitual offenders.

26. In fact, women's prisons typically have *fewer* program opportunities to offer their *more* diverse populations. *See* pp. 1242-43 *infra.*

Only in the federal system is there any attempt to classify female offenders among different institutions,[27] and even there the differentiation is slight as compared to the variety of male prisons available.[28] Some female institutions in the larger states, particularly those structured around the "cottage" system,[29] do attempt some segregation of offenders, but this is necessarily incomplete.[30] The women's prisons in most smaller states do not make even a superficial attempt at segregating inmates, though the male institutions in the same states often employ both intra- and inter-institution classifications.[31]

A few administrators suggest that population diversity (particularly with regard to age) may have a stabilizing effect on an institution.[32] The more common observation, however, is that greater classification would be preferable, particularly where the young or first-offenders are concerned.[33] The inmates themselves typically agree, claiming that women's institutions are more effective as schools for crime than re-

27. The federal institution at Fort Worth takes younger, short-term offenders, while the Alderson and Terminal Island institutions receive the complete range of female felons. Interview with McLaughlin, *supra* note 17.

28. The federal system has the following types of male institutions: six penitentiaries (one for younger offenders), two reformatories (both for younger criminals), three youth centers (one sexually integrated), nine correctional institutions (three for younger felons and misdemeanants), three prison camps, two detention centers, one medical center, and several community treatment centers. *ACA Directory, supra* note 2, at 98-101.

29. *See* pp. 1242-43 *infra.*

30. At Alderson, for example, some cottages are set aside for young offenders and there has recently been established a long-term cottage for women serving sentences of ten years or longer "to give them a sense of home . . . [and] make them comfortable." Interview with McLaughlin, *supra* note 17. The Bedford Hills institution in New York theoretically has both reformatory and prison sections for its female population. However, the populations are actually only segregated with respect to sleeping quarters. Interview with correctional officer, Bedford Hills Correctional Facility, July 18, 1972, on file with the *Yale Law Journal.* The California Institution for Women does have some segregation on a first-offender basis, but it is readily admitted that this is only superficial as far as the actual functioning of the institution is concerned. Interview with Carlson, *supra* note 18.

31. For example, the administrator of Oregon's one women's institution admits that it is impossible to segregate women according to record, offense, age, or other variables because of the small size of the institution and the limited resources available, with the result that "in a lot of cases young offenders are easily swayed [by older inmates]." Interview with educational program director, Women's Correctional Center, Aug. 16, 1972, on file with the *Yale Law Journal.* Oregon's male penitentiary, on the other hand, has special segregation and psychiatric units, and younger male offenders go to an entirely separate institution. *Id.*

32. Some say it would be good to separate the older from the younger offenders, but now the young know more about crime and drugs than the older ones. Perhaps the good of the older women rubs off on the younger . . . . Older women have "children" [within the institution] that they keep in line. This is missing in age-segregated institutions.

Interview with Joan Clark, administrator, Federal Correctional Institution at Terminal Island, Aug. 7, 1972, on file with the *Yale Law Journal.* The same administrator referred to those serving long sentences as "community builders" of the institution. *Id.* This feeling was echoed, though less forcefully, by the Warden at Alderson, who admitted that there is often "positive interaction between short- and long-term people." Interview with McLaughlin, *supra* note 17.

33. *See, e.g.,* interview with staff psychologist, Bedford Hills Correctional Facility, July 19, 1972, on file with the *Yale Law Journal. See also* note 31 *supra.*

habilitative centers.[34] Others voice concern over the loss of security inherent in overly-heterogeneous prison communities.[35]

3. *Institutional Services*

Some differences in the level of institutional services also seem to be primarily the product of the scale variations between male and female institutions. Two examples are medical and religious services.[36]

In general, male institutions are more likely to have complete hospital and dental facilities than female institutions.[37] Male prisons are also more likely to have a full-time medical staff, usually including both a physician[38] and a dentist.[39] Because of these differentials, women inmates are more likely to go into the community for medical care.[40] It should be noted, however, that in some states, where the female institution is near a male institution, medical facilities are shared.[41]

Male prisons are also more likely to have full-time chaplains[42] and occasionally even denominational variety in the available clergy.[43] By contrast, part-time and visiting chaplains typically provide the only

34. *See, e.g.*, interview with inmate, Connecticut Correctional Institution, June 6, 1972, on file with the *Yale Law Journal;* interview with inmate, Purdy Treatment Center for Women, Aug. 17, 1972, on file with the *Yale Law Journal;* interview with inmate, California Institution for Women, Aug. 16, 1972, on file with the *Yale Law Journal.*

35. For example, one of the inmates at Washington's Purdy Correctional Institution, which is run as a minimum security facility despite the fact that it contains all female felons incarcerated in the state, reports that "there are problems with having an open campus for everyone. Some women here are dangers to themselves; some are dangers to the community [inside the institution]." Interview with inmate, Purdy Treatment Center for Women, Aug. 17, 1972, on file with the *Yale Law Journal.*

36. For a brief discussion of the importance of medical and religious programs and personnel in prisons, see THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 51-53 (1967).

37. Of the sample prisons, sixty-seven percent of the female institutions categorized their hospital facilities as "non-existent" or "small," while only twenty-seven percent of the male institutions so described their medical resources. *Survey, supra* note 2.

38. Eighty percent of the women's institutions in the sample have no full-time physician, while only twenty-seven percent of the male institutions are without a full-time physician. *Survey, supra* note 2. This pattern also appears to hold in states outside the sample. *See, e.g.*, Division of Adult Corrections, Action Plan for the Immediate Development of an Improved Correctional System in Delaware, April, 1972, at 6-49; Maryland Division of Correction, Forty-third Report, Fiscal years 1970 and 1971, Oct. 1, 1971; Tennessee Department of Correction, Annual Report 1970-1971, Dec. 15, 1971.

39. Of the female sample institutions, eighty percent do not have a full-time dentist, while this is true of only nineteen percent of the male institutions. *Survey, supra* note 2.

40. This is the pattern in Michigan, Missouri, and Washington. *Survey, supra* note 2.

41. Of the women's institutions visited, those in Mississippi, New York, Oregon and the federal institution at Terminal Island reported such sharing with male institutions.

42. Forty percent of the female sample institutions have no full-time chaplain as compared to only nine percent of the male institutions. *Survey, supra* note 2.

43. Only twenty percent of the women's prisons in the sample have full-time chaplains of more than one denomination, while seventy-two percent of the male institutions have denominational variety in their full-time chaplain staff. *Survey, supra* note 2.

formal religious services available in a women's institution.[44] This disadvantage[45] may be quite significant, since chaplains are often an important source of counseling and a moving force behind prison reform.[46] Again, it should be noted that female institutions which are close to male institutions often receive more than the normal allotment of clergy.[47]

B. *Differences Influenced by Stereotyping*

Many of the most important differences between male and female prisons, while undoubtedly aggravated by scale considerations, are generated at least in part by legislative and administrative sexual stereotyping. Such differential treatment is found in physical surroundings, recreational facilities, institutional staff, and rehabilitative and industrial programs.

1. *Physical Environment*

The architecture and security arrangements of women's prisons suggest a greater emphasis on rehabilitation and a lesser concern with custody than those of men's prisons. Gun towers,[48] double fences, and concrete walls[49] are rare in women's institutions. Many are of the campus or cottage type, with dormitory, vocational training, and dining buildings grouped around a central yard.[50]

44. *Survey, supra* note 2. The West Virginia system illustrates the problem: The male state penitentiary has a full-time chaplain, but at the West Virginia State Prison for Women, the "religious program is carried out with visiting ministers twice a month, and residents [who] conduct Sunday School the remainder of the time." West Virginia Commissioner of Public Institutions, Annual Report, 1970-1971, at 53.

45. It should be noted, however, that in states where the women's institution does have a full-time chaplain there is an advantage that is likely to cut the other way, since female prisons are likely to have a better chaplain/inmate ratio. For example, in the state of Washington the ratio at the female prison at Purdy is 1:150, while at the male institutions in Walla Walla and Monroe it is 1:652 and 1:343 respectively. *Survey, supra* note 2.

46. Ohio Dept. of Rehabilitation and Correction, Portrait: 1971.

47. For example, the women's camp at Parchman (the Mississippi state penitentiary) shares four chaplains with the male population of the adjacent plantation. *Survey, supra* note 2.

48. All but two of the forty-seven male institutions in the sample reported gun towers, while only two of the fifteen female institutions have them. *Survey, supra* note 2.

49. Half of the male institutions in the sample have stone or concrete walls, while none of the female institutions have more than a chain-link fence. One-third of the female institutions reported no perimeter wall at all, while only two of the forty-seven male prisons made a similar claim. *Survey, supra* note 2.

50. According to some departments of corrections, women's institutions seem positively bucolic: "The institution [Virginia State Industrial Farm for Women] commands a view of some of the most beautiful rolling countryside in central Virginia. The red brick buildings, trimmed in white, give the appearance of a college campus." Division of Corrections, Department of Welfare and Institutions, The Judicial Conference of Virginia, February 9-11, 1972, at 22. South Carolina's Harbison Correctional Institution for Women was formerly a junior college (Attachment No. 2. to letter from William D.

The interiors of women's prisons also reflect the societal judgment that female inmates require more privacy and individuality, but less security relative to each other and the outside world. For example, women's sleeping quarters are usually private rooms rather than the multi-bed barracks or multi-tiered cellblocks typical of male facilities.[51] When men are given individual cells, the explanation is usually the security needs of the institution rather than the privacy needs of the prisoner.[52] Reflecting a similar concern for privacy, women's toilet facilities are usually partitioned, unlike the open latrines of most male institutions.[53] Shower units are also often partitioned or provided with curtains, while men's showers are usually communal.[54]

Prison rules frequently reflect the same stereotypes. In many institutions, women may choose their own bedspreads, furniture covers, and curtains. Such individual expression is much less frequently permitted in male institutions,[55] perhaps in part because men are not thought to require a "homelike" atmosphere, but also undoubtedly to facilitate the far more frequent cell searches,[56] a practice which may itself be induced by sexual stereotyping. Furthermore, inmate uniforms, which are almost universally mandated in men's prisons, are not typically required in women's institutions.[57] This difference is

Leeke, Director, South Carolina Department of Corrections, Aug. 16, 1972, on file with the *Yale Law Journal*), and the main building of the West Virginia State Prison for Women was formerly a resort hotel (West Virginia Commissioner of Public Institutions, Annual Report for 1970-1971, at 52). Conversely, Connecticut is considering plans to convert its present women's prison into a junior college. Interview with administrator, Connecticut Correctional Institution, June 8, 1972, on file with the *Yale Law Journal*.

51. All but three of the fifteen female institutions in the sample house their populations in private rooms. Only six of the forty-seven male institutions have private rooms —the overwhelming majority of male inmates are housed in cells or dormitories. *Survey, supra* note 2. It should be emphasized that the difference between a private room and a cell is more than mere nomenclature: Cells are usually constructed with bars on the windows and doors, are frequently enclosed on one side with a wall consisting only of bars, and are arranged in tiers. Private rooms have screens rather than bars on windows, doors made of wood with only a small aperture for security checks, and are in most other respects indistinguishable from college dormitory rooms. *See* note 50 *supra*.

This differential between male and female prisons is fully recognized by corrections officers, who often stress the superiority of the facilities provided for women. *See, e.g.*, Ohio Dept. of Rehabilitation and Correction, Portrait: 1971, at 36.

52. Interview with William Nagel, Executive Director, American Foundation Institute of Corrections, in Philadelphia, Pa., July 11, 1972, on file with the *Yale Law Journal*.

53. Eighty percent of the women's institutions in the sample provide private toilet facilities for all inmates, while only forty-five percent of the male institutions make similar provisions. *Survey, supra* note 2.

54. None of the male institutions in the sample reported private shower facilities; nine of the fifteen female institutions have them. *Survey, supra* note 2.

55. All but one of the female institutions in the sample allow inmates to decorate their living areas, while only thirty-four percent of the male institutions permit such decoration (another thirty percent allow "limited decoration"). *Survey, supra* note 2.

56. Interview with Nagel, *supra* note 52.

57. Only six of the fifteen sample female prisons require women inmates to wear uniforms, while all but three of the forty-seven male institutions surveyed require inmates to wear them. *Survey, supra* note 2.

often explained in terms of the greater importance of personal appearance to women.[58]

2. *Recreational Facilities*

Male inmates usually have a considerable advantage in terms of recreational facilities. For example, female institutions seldom have playing fields.[59] Where there is a large outdoor area available at a women's institution, insufficient staff may necessitate only limited use of the area.[60] Similarly, there is apt to be less variety in the recreational programs of female institutions.[61] In justifying such disparities, administrators stress not only problems of scale but also perceived differences in the recreational needs of men and women.[62] It is often argued that women inmates "just don't need the sort of physical exertion that men do."[63]

In several states, however, women inmates enjoy at least one recreational advantage: They are allowed to make more trips outside the prison—for movies, bowling, swimming, and athletic events—than are their male counterparts.[64] This advantage accrues to women inmates because they are perceived to be less dangerous and escape-prone, and because such trips are much easier to manage with the typically smaller female populations.[65]

58. *See, e.g.*, Interview with Burns, *supra* note 21:

> Dress is pretty important in terms of self respect . . . . The uniform really knocks identity . . . . In terms of identity, personal appearance is more important to women than to men.

59. The women's institutions in the sample states of Missouri, Nebraska, New York, and Oregon have only "yards," not playing fields, while all male institutions surveyed reported playing fields. *Survey, supra* note 2. It should be noted, however, that in one state, Alabama, an administrator remarked, "The women are better off in terms of recreational areas than almost anywhere else in the [Alabama] system." Interview with John Braddy, Public Relations Director, Alabama State Board of Corrections in Montgomery, Alabama, Aug. 24, 1972, on file with the *Yale Law Journal*.

60. *See, e.g.*, The American Foundation, Inc., Institute of Corrections, Visitation Summaries, Colorado Women's Institution, on file with the *Yale Law Journal*.

61. For example, only forty percent of the sample women's prisons have gymnasium facilities, while seventy percent of the men's institutions have them. Scale seems to play an important role in these statistics, since those women's institutions having gymnasium facilities tended to be the larger ones in the sample. *Survey, supra* note 2.

62. *See, e.g.*, interview with correctional counselor, Illinois State Reformatory for Women, Aug. 31, 1972, on file with the *Yale Law Journal*. This staff member remarked that:

> Many people don't realize how impractical certain programs would be . . . . Outdoor activities have been tried, but not many signed up . . . . Unless you have a young group, when women get on toward middle age they like to crochet . . . knit . . . they read, they loaf . . . they stay in bed . . . but what do housewives on the outside do?

63. Interview with Burns, *supra* note 21.

64. *Survey, supra* note 2. Eighty percent of the female institutions, but only seventeen percent of the male institutions in the sample reported regular use of such trips. *Id.*

65. Interviews with Nagel, *supra* note 52, and Clark, *supra* note 32.

3. *Institutional Staff*

The staff at men's and women's prisons differ both in number and in their relationship to the inmate populations. First, as Appendix I indicates, there tend to be more staff members per inmate in female institutions.[66] An even greater disparity appears when the statistics on "treatment" personnel (teachers, vocational instructors, counselors) are compared.[67] It should be noted, however, that while the higher staff/inmate ratios at women's prisons are most often viewed as advantageous, inmates at some female institutions complain that the more numerous staff infringe on their privacy.[68]

This numerical differential, while undoubtedly significant, does not fully account for the different staff-inmate relationships that characterize men's and women's prisons. Administrators at female insti-

66. In twelve of the fifteen sample states the female institutions have a better staff/inmate ratio than the average ratio of male institutions in the same state. It is noticeable that the staff/inmate ratios in smaller male institutions are generally higher than are the ratios in larger male institutions in the same state, so scale is probably an important factor. *See* Appendix I.

67. *See* Appendix I. Staff expenditures account for more than half of annual operating expenses of many institutions. *Survey, supra* note 2. Consequently, the better staff/inmate ratios in women's prisons are reflected in substantially higher annual expenditures per inmate, as shown in the following table:

Annual Expenditure per Inmate
(1971)

State	*Females*	*Males*	*Females/Males*
Alabama	$ 3,189	$1,644	1.9
California	6,820	4,862	1.4
Connecticut	9,850	5,278	1.9
Illinois	8,938	5,879	1.5
Indiana	4,273	3,083	1.4
Michigan	4,015	3,336	1.2
Minnesota	8,842	5,204	1.7
Mississippi	1,834	1,834	1.0*
Missouri	3,111	2,289	1.4
Nebraska	5,053	3,727	1.4
New York	16,193	4,371	3.8
Ohio	5,346	4,862	1.1
Oregon	2,691	5,732	.47
Pennsylvania	10,060	3,285	3.4
Washington	10,306	4,375	2.4

Source: *Survey, supra* note 2, and materials on file with the *Yale Law Journal.*
* Mississippi incarcerates its male and female felons in segregated sections of its single correctional institution at Parchman. The annual budget for the entire institution is not broken down by sex.

68. Residents at the Connecticut and Oregon women's institutions complained of such "meddling." Interviews with inmate, Connecticut Correctional Institution, June 8, 1972, and with inmates, Oregon Women's Correctional Center, Aug. 16, 1972, on file with the *Yale Law Journal. See also* interview with Margery L. Velimesis, Executive Director, Pennsylvania Program for Women and Girl Offenders, in Philadelphia, July 11, 1972, on file with the *Yale Law Journal:*

> There is not as much physical brutality in women's prisons, but psychological pressures are substituted for this. Whereas in men's prisons there is sometimes one guard for two hundred inmates, women's prisons have almost too many people around.

tutions frequently describe that relationship as "mother-daughter," whereas the staff in male prisons usually tend to be more concerned with rules and order.[69] Characteristically, the staff at male prisons are more likely to wear uniforms.[70]

An additional factor bearing on staff-inmate relationships is the greater sexual integration of the staffs of female institutions.[71] Women's prisons have traditionally had some staff integration, with male correctional officers assigned for security reasons.[72] Because of the stereotype of male prisoners as more dangerous, however, female correctional officers were rarely assigned to male institutions. Recently, the administrators of several female institutions have come to see male staff as beneficial for reasons other than security: There is a feeling that the institutional atmosphere is more "natural" when members of both sexes are present as correctional officials.[73] Some male institutions are also beginning to realize the advantages of sexually-mixed staffs,[74] although they are generally still far behind in the process of integration.[75]

4. *Educational and Vocational Programs*

There are some differences in the academic education available to male and female offenders, although they are not as consistent or severe as those in other treatment areas.[76] Differences in academic

69. These characteristics were supplied by a psychologist who has worked in both male and female institutions. Interview with staff psychologist, Bedford Hills Correctional Institution, June 18, 1972, on file with the *Yale Law Journal*. *See also* interview with Nagel, *supra* note 52. The large numbers that must be handled at male institutions is probably an important factor contributing to this philosophy.

70. Guards at ninety-five percent of the sample male institutions are required to wear uniforms; only forty percent of the female institutions have such a requirement. *Survey*, *supra* note 2.

71. For example, there are five male correctional officers at the Julia Tutwiler Prison for Women in Alabama, but no female officers in the state's male institutions. Even more striking, half the staff at Washington's female institution at Purdy is male, while there are no female correctional officers at the state penitentiary in Walla Walla. *See* Appendix I.

72. Interview with correctional counselor, Connecticut Correctional Institution, June 8, 1972, on file with the *Yale Law Journal*.

73. As the superintendent of the California Institution for Women put it, "It's good [for the inmates] to relate to both sexes." Interview with Carlson, *supra* note 18. The warden at Terminal Island agreed: "I think having men in close proximity is a good thing . . . it's good for the staff to work with male staff . . . it's good for the inmates . . . important psychologically." Interview with Clark, *supra* note 32.

74. The superintendent of the California Institution for Women now complains of losing staff to the male institutions in that state. Interview with Carlson, *supra* note 18.

75. An integrated staff, however, need not be utilized in a manner that would infringe the privacy right of inmates. This danger can be easily avoided by providing that strip searches and shower observation, where necessary, be conducted by officers of the same sex. *See* note 157 *infra*.

76. Among the sample institutions, the following differences were reported: Michigan does not provide first through eighth grade or study-release educational programs for inmates at the Detroit House of Corrections (women), but it does provide such programs

education generally stem from factors of scale and tend to disadvantage female inmates. In a few states, the one women's institution is considered too small to justify any educational program at all;[77] more frequently, a particular program will not be offered at the female institution but will be available at some of the state's male prisons.[78]

Substantial differences are also found in prison teaching staffs: Women's prisons tend to have fewer teachers, but better teacher/inmate ratios.[79] Thus, while the larger number of teachers in men's prisons permits specialization by both grade level and subject matter, the better teacher/inmate ratio in women's prisons may permit more individual attention and assistance.

The influence of sexual stereotypes creates a much greater disparity in vocational training. (See Appendix II.) First, the types of programs offered at male and female prisons are very different. Men are usually given programs in mechanical skills and physical labor, while women are offered training in clerical skills and personal serv-

for male inmates at one of its male prisons; California has no study-release program for women, but does have such a program at the California Institution for Men; Alabama provides no college-level courses for women, but does provide such courses at one of its men's institutions; and Nebraska provides junior college education on a study release basis for women, but provides a four year college program on the premises of its men's prison. *Survey, supra* note 2.

77. *See, e.g.,* Delaware Division of Adult Corrections, An Action Plan for the Immediate Development of an Improved Correctional System in Delaware, April, 1972, at 6-25, 6-30.

78. *See* note 76 *supra.* According to state-supplied information on file with the *Yale Law Journal,* Alabama, Delaware, Massachusetts, Nevada, Pennsylvania, Tennessee, and West Virginia do not offer women inmates college level courses, while at least one of their male prisons do so.

79. The following table indicates the differences in the number of teachers and the number of inmates per teacher at the sample institutions. It is assumed that part-time teachers worked half-time.

	Women's Institution		Men's Institutions		
			Teachers		Inmates/Teacher
State	Teachers	Inmates/Teacher	Average	Range	Average
Alabama	2.5	48	2.5	0-4	391
California	7	106	9.5	5-13	295
Connecticut	3.5	42	7	2-9	76
Illinois	6	24	8	3-11	282
Indiana	1	129	12	3-28	109
Michigan	8.5	38	30	28-33	85
Minnesota	1	55	9	7.5-11	88
Mississippi	1	50	4	single prison	425
Missouri	4.5	19	12	9-20	77
Nebraska	3	15	6	single prison	162
New York	12	25	13.5	6-37	121
Ohio	5.5	57	15	8-33	107
Oregon	1	63	8	8	106
Pennsylvania	3	50	13	5-38	107
Washington	12.5	14	13	9-17.5	75

Calculations based on populations listed in *ACA Directory, supra* note 2, and information acquired in *Survey, supra* note 2.

ices. Second, male prisons consistently offer a far greater variety of vocational programs.[80] This disadvantage for women is compounded by the fact that male inmates are often assigned to a particular institution, at least in part, on the basis of their vocational needs.[81] Although scale considerations may account for some of these differences, the fact that even the larger female institutions do not have more than two or three programs[82]—and the nature of the programs that are offered—attest to the influence of sex stereotypes.[83]

5. *Industrial Programs*

Although both male and female prisons typically have some industry,[84] men again enjoy a considerable advantage in both number and variety. (See Appendix III.) These differences are partially a function of scale,[85] but they also clearly reflect various stereotype-induced judgments: that participation in industrial programs is inconsistent with the rehabilitative function of women's prisons; that women should not be used as part of a state-created work force; and that women should not be subject to the form of punishment embodied in certain prison industries. The relative number of programs available in female institutions is too small to be explained by scale alone,[86] and those programs that are offered reflect general societal stereotypes concerning the appropriate work for women.

80. The average number of programs in the sample male prisons is 10.2, while the average for the female prisons is 2.7. *See* Appendix II.

81. Most institutions contacted said that where there was more than one men's prison in the state, offenders were assigned to a specific institution on the basis of some classification scheme involving, at least partially, the rehabilitative needs of the inmate. *Survey, supra* note 2.

82. Although the female institutions in the sample vary in population from forty-four to 739, *see ACA Directory, supra* note 2, no institution has less than one program, and only one has more than three. *Survey, supra* note 2.

83. *See, e.g.*, Office of Adult Corrections, Department of Social and Health Services of the State of Washington, Adult Correctional Institutions Education Programs, May 18, 1972, at 3:

> Because a large proportion of residents in the institution will be paroled to their homes as homemakers, and do not necessarily plan to pursue employment careers, the curriculum is designed to include training which will improve their qualifications as homemakers and also provide a cultural enrichment opportunity.

The same pamphlet acknowledges that:

> For those who do propose to follow careers in the work world, the small population of the institution makes it difficult to provide a wide range of vocational courses.

Id.

84. Fifty-three of the sixty-two sample prisons have at least one prison industry.

85. Scale is probably an important factor in explaining the lack of industries at the female prisons in Minnesota, Missouri, Oregon, and Washington, where the prison populations are approximately 100 or less. Yet if all the women's prisons in the sample are compared, it appears that size has relatively little to do with the number of industries at a female institution: The largest institution (California) and the smallest (Nebraska) each have only one industry. *See* Appendix III.

86. The average number of industries in the sample male prisons is 3.2, as compared to 1.2 for the female prisons. *See* Appendix III.

C. *The Dual System: An Assessment*

In sum, male and female inmates face markedly different prison experiences: Neither has an exclusive claim to "better" treatment. Women are undoubtedly disadvantaged by the remoteness of their prisons, the heterogeneity of their populations, and the lower level of institutional services and rehabilitative programs available to them. Men are generally disadvantaged by the nature of their physical surroundings, their staff/inmate ratios, and the relatively stricter regime of their institutions. Finally, many inmates of *both* sexes are disadvantaged by being treated according to stereotypes applied to all the members of their sex in a segregated correctional system.

II. The Fourteenth Amendment: Modification of the Dual System

Much of the differential treatment of men and women inmates is probably permissible under the Fourteenth Amendment. Although the Supreme Court has never explicitly considered the issue, its decisions in other women's rights cases suggest that most of the sexual classifications in prisons today do not violate constitutional standards.[87]

A. *The Rational Basis Test*

In *Goesaert v. Cleary*,[88] the first women's rights case to reach the Supreme Court, the Court employed a "rational basis" test in upholding a Michigan statute limiting bartending licenses to men. Combining this limited approach with a reluctance to interfere with state correctional practices,[89] a number of courts in the early twentieth

87. For an assessment of the Equal Protection Clause as a vehicle for asserting women's rights, see *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971). *See generally* L. KANOWITZ, WOMEN AND THE LAW (1969).

88. 335 U.S. 464 (1948).

89. Though the Supreme Court has never considered the differential treatment of men and women in correctional institutions, its decision in Ughbanks v. Armstrong, 208 U.S. 481 (1908) suggested a general hostility toward equal protection challenges in the area of criminal corrections. In *Ughbanks*, a male offender was sentenced under an indeterminate sentencing statute which made him ineligible for normal parole. The Court rejected his claim that this was a denial of equal protection, finding that the Fourteenth Amendment was not intended to limit a state's discretion in correctional matters. *Id.* at 487.

Ughbanks was considered representative of the "hands-off" doctrine, which foreclosed almost all prisoners' rights cases from judicial review until the 1960's. *See* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). *See also* Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). Courts have justified this doctrine by citing the separation of powers. *See, e.g.*, United States v. Marchese, 341 F.2d 782, 789 (9th Cir. 1965) ("The federal prison system is operated in all its aspects by . . . the executive branch of the government, and not by the judiciary . . . ."). They have also pointed

century rejected equal protection challenges to statutes subjecting men to fixed sentences but women to indeterminate terms.[90] The leading case is *State v. Heitman*,[91] where in upholding such a scheme, the Kansas Supreme Court considered at some length the legal and penological basis for sexual differentials in corrections.[92]

The *Heitman* court argued simply that since men and women differ physically and psychologically,[93] and therefore require different correctional facilities and programs,[94] the rationality of sexual classifications was "obvious."[95] When the next major cluster of equal protection challenges to sexual correctional classifications reached the courts in the late sixties, the *Heitman* rationale, if not its faith

to the lack of judicial experience in penology, (*See, e.g.*, Carothers v. Follette, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970)) and the fear that judicial efforts to review the treatment of prisoners might lead to burdensome judicial supervision of every aspect of prison life (*see* Barnett v. Rodgers, 410 F.2d 995, 1004 (D.C. Cir. 1969)).

The "hands-off" doctrine has weakened considerably in recent years, as judicial review of administrative action has broadened. Access to the courts was the first area in which the hands-off doctrine was rejected. *See, e.g., Ex parte* Hull, 312 U.S. 546 (1941). These cases created precedent for a variety of other prisoners' rights, and also insured access to the courts for the assertion of these rights. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969) (the right to prepare habeas petitions for other prisoners); Cooper v. Pate, 378 U.S. 546 (1964) (freedom of religion); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 900 (1966) (the right to be free from arbitrary treatment); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (the right to be housed in racially integrated facilities). *See generally* 1 & 2 PRACTISING LAW INSTITUTE, PRISONER'S RIGHTS (1972).

90. *See, e.g., Ex parte* Gosselin, 141 Me. 412, 44 A.2d 882 (1945); Platt v. Commonwealth, 256 Mass. 539, 152 N.E. 914 (1926); *Ex parte* Brady, 116 Ohio St. 512, 157 N.E. 69 (1927); *Ex parte* Fenwick, 110 Ohio St. 350, 144 N.E. 269 (1924).

A number of other decisions before 1930 sustained differential treatment of men and women in correctional contexts. *See, e.g.*, State v. Gardner, 178 Iowa 748, 156 N.W. 747 (1916) (criminalizing prostitution for women, but not for men, is valid); *In re* Dunkerton, 104 Kan. 481, 179 P. 347 (1919) (state provision of separate and less diversified facilities for female convicts is permissible); People *ex rel.* Barone v. Fox, 129 N.Y.S. 646 (App. Div. 1911) (compulsory hospitalization of prostitutes suspected of venereal infection but not of their male patrons is permissible). *But see* Morgan v. State, 179 Ind. 300, 101 N.E. 6 (1913) (statute providing for incarceration of men at hospital for the criminally insane constitutes unreasonable classification since women are not covered by the statute).

91. 105 Kan. 139, 181 P. 630 (1919).

92. The *Heitman* court hailed the "new penology," which it thought justified the Kansas scheme. The fixed sentence given to men was viewed as a "relic of the stone age of penological theory," while the county jail—to which men were sent—was an "unqualifiedly reprobated and repudiated punitive institution . . . tending to moral contamination and induration, rather than to moral upbuilding." 105 Kan. at 144, 181 P. at 633. Women, perceived as more responsive than men to rehabilitation, were deemed more suited for the state's industrial farm. At the same time, indeterminate sentences were seen as necessary so that each woman could proceed toward rehabilitation at her own pace.

93. "Woman enters spheres of sensation, perception, emotion, desire, knowledge and experience, of an intensity and of a kind which man cannot know." 105 Kan. at 147, 181 P. at 634.

94. "[T]he result [of the differences between the sexes] is a feminine type radically different from the masculine type, which demands special consideration in the study and treatment of nonconformity to law." 105 Kan. at 147, 181 P. at 634.

95. 105 Kan. at 146, 181 P. at 633.

in the rehabilitative ideal, still seemed to control,[96] and the differential treatment of men and women within prisons has yet to be held unconstitutional by any court.

B. *Emergence of a Stricter Standard of Review*

However, since 1968, several state and lower federal courts have entertained successful challenges to differential sentencing schemes.[97] The two leading cases, *Commonwealth v. Daniel*[98] and *United States v. York*,[99] suggest a stricter standard of review which might be applicable to all sexual classifications in criminal corrections.

In *Daniel*, the Pennsylvania Supreme Court invalidated a statute which required a judge, in the case of female offenders only, to fix an indeterminate sentence at the statutory maximum for the particular offense. However, though the court found that this particular statute represented an "arbitrary and invidious discrimination,"[100] it was unwilling to say that sex was an unreasonable classification for all purposes:

> A classification by sex alone would not, *per se*, offend the Equal Protection Clause . . . . For example, there are undoubtedly significant biological, natural and practical differences between men and women which would justify, under certain circumstances, the establishment of different employment qualification standards.[101]

Although the *Daniel* court thus used the language of the rational classification test, it was clearly employing a somewhat more rigorous standard than that of *Heitman*. The statute under attack in *Daniel* embodied the arguably rational judgment that women respond better

96. A series of Maryland decisions, for example, held that the state could exclude females from its sole facility for defective delinquents. Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969); Gray v. Director, 245 Md. 80, 224 A.2d 879 (1966); Chambers v. Director, 244 Md. 697, 223 A.2d 774 (1966). Similarly, the Oklahoma courts denied several equal protection challenges to sex differentials in the age limits of juvenile status, finding that the statute in question was "premised on the demonstrated facts of life . . . ." Lamb v. State, 475 P.2d 829, 830 (Okla. Crim. App. 1970). *See also* Wark v. State, 266 A.2d 62 (Sup. Jud. Ct. Me. 1970), *cert. denied*, 400 U.S. 952 (1970) (upholding a statute which authorized greater penalties for escape from a penal institution for men than for women); Benson v. State, 488 P.2d 383 (Okla. Crim. App. 1971); Johnson v. State, 476 P.2d 397 (Okla. Crim. App. 1970).

97. *See* United States *ex rel.* Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968); United States v. York, 281 F. Supp. 8 (D. Conn. 1968); Liberti v. York, 28 Conn. Supp. 9, 246 A.2d 106 (1968); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

98. 430 Pa. 642, 243 A.2d 400 (1968).

99. 281 F. Supp. 8 (D. Conn. 1968).

100. 430 Pa. at 648, 243 A.2d at 403.

101. 430 Pa. at 649, 243 A.2d at 403.

to individualized institutions or sentences, yet the *Daniel* court required a more cogent showing of rationality.

In *York,* a federal district court went even further in invalidating Connecticut's differential sentencing scheme.[102] Although the court acknowledged that judicial deference to legislative classifications "can extend to classifications based on sex,"[103] it nevertheless subjected the Connecticut statute to a strict standard of review.[104] *York* even went so far as to suggest that *all* sex classifications should receive such strict scrutiny:

> While the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group.[105]

The *York* opinion thus cut through many of the fictions that had justified sexually different correctional treatment since *Heitman.* It required the state to show that its classification was reasonable in light of its purposes, and this Connecticut was unable to do: It could not demonstrate that women in fact required longer periods of incarceration, nor could it show that there was actually a difference in the "quality of treatment and conditions of incarceration" at the women's facility.[106]

Although *York* and *Daniel* probably cannot be read to require strict scrutiny of all sexual classifications, they do suggest an "intermediate" standard of review in certain circumstances. The combination of a marginally suspect sex classification, bolstered perhaps by an unwillingness to accept the grosser sexual stereotypes of *Heitman,* seems to have produced a more "active" rational basis test. Such a test refuses to accept a legislative rationale a priori, but rather asks for substantial and empirically grounded justifications which seem rea-

102. The Connecticut statute at issue in *York* required an indeterminate sentence for female offenders with a maximum of three years. A male convicted of the same offense would receive a maximum sentence of twelve months. Thus, the situation in *York* is somewhat different from that of *Heitman* and *Daniel* in that in *York* the dissimilar treatment was not only with respect to fixed versus indeterminate sentencing, but also with respect to the maximum possible sentence.

103. 281 F. Supp. at 13.

104. The court declared that the challenged statute must be supported by a "full measure of justification to overcome the equal protection which is guaranteed . . . ." *Id.* at 14.

105. *Id.* at 14. It is unclear whether the court's holding in *York* represents an acceptance of this blanket extension of the strict standard, or whether it instead indicates that the fundamental interests touched by incarceration *combined* with a sex classification warranted such careful scrutiny.

106. *Id.* at 15.

sonable[107] and which are narrowly drawn to reflect the real—and relevant—differences between men and women.

Recently, the Supreme Court seems to have applied just such an intermediate test in *Reed v. Reed*,[108] where it invalidated an Idaho statute providing that as between equally qualified estate administrators men must be preferred over women.[109] The statutory justifications advanced by the state in *Reed*—efficient judicial administration and the avoidance of intra-family disputes—seem at least as persuasive as those in *Goesaert*.[110] Yet the *Reed* Court nevertheless found them insufficient.[111]

The Court's opinion is, however, quite brief and its reasoning unclear. The Court may simply have decided that the statute in question was not actually conducive to either harmony or efficiency and was thus not even rationally related to any permissible legislative goal. Or it may have decided that the means chosen for furthering the state's goals *unnecessarily* infringed on the equal treatment of men and women. Finally, the Court may have found that the goals in *Reed*, even if there were no other "less drastic means," were not worth the resulting sexual discrimination. Whatever the Court's rationale, it clearly involved closer judicial scrutiny than had previously been evidenced in women's rights cases.[112]

107. At least one court has been quite explicit in its use of such a test. In State v. Costello, 59 N.J. 334, 282 A.2d 748 (1971), the New Jersey Supreme Court considered a challenge to that state's indeterminate sentencing statute. The court concluded that a remand was necessary, at which the state would be expected to show, in an adversary hearing, "substantial justification" for the scheme, "empirically grounded to the greatest extent possible." 59 N.J. at 346, 282 A.2d at 755. *See also* Liberti v. York, 28 Conn. Supp. 9, 246 A.2d 106 (1968), where the court, in invalidating a differential sentencing scheme in Connecticut, said that "factually and statistically, there is no basis" for such differential treatment. 28 Conn. Supp. at 10, 246 A.2d at 107.

108. 404 U.S. 71 (1971).

109. The *Reed* Court phrased the question before it in traditional "rational basis" terms: "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a State objective that is sought to be advanced." 404 U.S. at 76. After a period of relative quiescence, during which the Court developed the new doctrines involving "compelling state interests" and "suspect classifications," the traditional "rational basis" test seems to be enjoying a resurgence. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972) (invalidating a statute prohibiting unmarried persons from obtaining contraceptives); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (upholding a maximum welfare grant statute). For a re-evaluation of the traditional rationality standard in the light of recent decisions, see Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

110. *See* note 88 *supra*. An intermediate standard seems to have been used in three of the more recent "bartender" cases. *See* Seidenberg v. McSorleys' Old Ale House, 317 F. Supp. 593, 606 (S.D.N.Y. 1970), which explicitly rejected as inadequate the *Goesaert* rationale. *See also* Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970).

111. For discussion and criticism of these and other theories underlying the "rational basis" test, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

112. *See* pp. 1244-45 *supra*.

C. *Application of the Intermediate Standard of Review*

There are, of course, some treatment differentials which even a relatively permissive standard of review would invalidate. A substantial disparity in the basic necessities would be unconstitutional simply because it would be difficult to find any rational basis for such a difference.[113] And even those treatment differentials which do have an arguably rational basis might still be invalidated under an "intermediate" standard of review.

1. *Segregated Institutions*

The most salient difference in the treatment of men and women inmates is, of course, that they are treated separately. Significantly, no court has ever suggested that sexually segregated prison facilities are unconstitutional; indeed, the *York* court expressly approved them.[114]

An intermediate standard would require some substantial justification for the maintenance of segregated institutions. To be sure, the state might assert its interest in preserving order within prison facilities: In view of the small number of female inmates, male competition for the attentions of a few women might be a source of tension, if not violence. Though security interests have been held to be insufficient to justify the maintenance of racially segregated prison facilities,[115] the greater tolerance of sexual classifications would prob-

113. Courts have recently looked to per capita state expenditure to determine the existence of discrimination in the provision of government services. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972). However, such analysis would be largely inapplicable in the prison context. First, state budgetary provisions with regard to correctional institutions are by necessity presented in terms of annual operating expenditures, which do not reveal disparities in capital costs. *See* note 67 *supra*. In light of the great differences in physical plant that typify male and female institutions, these disparities are probably very significant. *See* pp. 1237-38 *supra*. Second, such figures do not take economies of scale into account. Women's prisons may need a far higher staff/inmate ratio to provide the same level of services available at the larger male institutions. Third, expenditures alone do not necessarily reflect differences in quality and variety, which are particularly important with regard to prison vocational programs and industries. *See* p. 1243 *supra*.

114. United States v. York, 281 F. Supp. 8, 15 (D. Conn. 1968):

> There are a number of things that could well be said in defense of separate institutions for women . . . . There are ample reasons for separate institutions, and the State may permissibly introduce priorities and co-ordination between them . . . .

The notion of sexually integrated facilities was unthinkable to the *Heitman* court: It was "not worthwhile discussing the necessity of preventing promiscuous association of the sexes in prison. There must be complete segregation." 105 Kan. at 147, 181 P. at 634.

115. In Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968), the court ordered the complete racial integration of the Alabama prison system, including the maximum security unit, within one year. While recognizing that in some isolated instances prison security and discipline might necessitate racial segregation for a limited period, the court could not conceive of such consideration requiring complete and permanent segregation of the races in all Alabama prison facilities. In McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972), the Eighth Circuit rejected similar arguments in ordering

ably lead to a contrary outcome, unless the new federal experiment[110] with a partially integrated prison undercuts the claim that sexual integration leads to violence.

The state might also argue that administrative efficiency justifies segregation. If it could demonstrate that men are *generally* more violent or escape-prone, sexual segregation might be the easiest, if not the most accurate, method of allocating inmates to institutions with appropriate security arrangements.[117]

Finally, the state might assert its interest in the rehabilitation of the female inmate population. If the relatively small number of women prisoners in any one state were divided among the men's institutions, only a handful would be left within each essentially all-male institution. The state might well argue that the resulting lack of female companionship and male orientation of prison programs would be detrimental to the comfort and rehabilitation of the women prisoners.

Courts have, in fact, approved such considerations in both the correctional and educational context, usually holding the sexual separation to be constitutional unless the facilities available to one sex are markedly inferior.[118] Thus, the inference drawn from the racial con-

the racial integration of all facilities at the Nebraska Correctional Complex. The court explained that if violent disruptions occurred, it was the duty of the administrators to take appropriate action against the offending inmates, black or white. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958) (rejecting the security argument in the context of school integration).

116. *See* note 184 *infra.*

117. This justification was given judicial approval in Wark v. State, 266 A.2d 62, 65 (Sup. Jud. Ct. Me. 1970):

> [T]here is a validating relationship as between the varying behavioral patterns of the two sexes and the statutory distinction as between the sexes . . . the legislature could reasonably conclude that the greater physical strength, aggressiveness and disposition toward violent action so frequently displayed by a male prisoner bent on escape from a maximum security institution presents a far greater risk of harm to prison guards and personnel . . . than is the case when escape is undertaken by a woman confined in an institution designed primarily for reform and rehabilitation.

118. For example, in Chambers v. Director, 244 Md. 697, 223 A.2d 774 (Ct. App. 1966), the Maryland Court of Appeals declared that:

> [A]ssuming the state has chosen . . . to exclude [women from its sole facility for defective delinquents], it cannot be said that this would constitute an improper exercise of power. We see no reason why the State cannot limit the program to whichever sex seems immediately to constitute the greater danger to society, provided the basis for this determination is a reasonable one.

244 Md. at 699-700, 223 A.2d at 776. Considering the same issue three years later, the U.S. District Court indicated that administrative inconvenience and fiscal economy were reasonable grounds for excluding women. It was "quite clear," said the court, that the facility could not "satisfactorily be run as a coeducational institute." Moreover, "the number of female defective delinquents 'fortunately' is small, and would not justify building a separate institution for them." Sas v. Maryland, 295 F. Supp. 389, 418 (D. Md. 1969).

See also Heaton v. Bristol, 317 S.W.2d 86, 99 (Tex. Crim.), *cert. denied,* 359 U.S. 230 (1958), *rehearing denied,* 359 U.S. 999 (1959) (upholding the exclusion of women from Texas A & M College, noting that their admission could create "vexing problems"); Williams v. McNair, 316 F. Supp. 134 (D.S.C.), *aff'd,* 401 U.S. 951 (1970) (upholding a females-only admissions policy at a state-supported college, in the absence of a showing

text that separation *itself* denotes inferiority does not seem to apply in cases of sexual segregation, and a "separate but equal" system appears to be permissible[119] under the Fourteenth Amendment.

2. *The Remoteness-Heterogeneity Dilemma*

As noted above, women's prisons are too few in number to permit incarceration near the inmate's home[120] and are also generally too small to permit significant internal classification.[121] The only satisfactory method of eliminating such disadvantages—short of sexual integration—would be to construct small, local women's institutions in each state equal in number and variety to that of the state's male system.

Support for such equalization may be derived from *Commonwealth v. Stauffer*,[122] where a Pennsylvania court voided a plan of differential incarceration—men to jails, women to a penitentiary—for the same misdemeanor. The court reasoned that mixing first-offender misdemeanants with "hardened" criminals amounted to a violation of equal protection, since similarly situated men faced no such threat. As men are in most states segregated according to some classification scheme, women might, in view of *Stauffer*, claim a right to be similarly classified.[123] The recognition of such a right without the sexual integration of prisons is unlikely, however, since few courts would order a state to expend the millions necessary to provide a full range of correctional institutions for women.

that the college was more educationally desirable than the state institutions which admitted males); Kirstein v. Rector and Board of Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (finding that the exclusion of women from the state's prestige college denied women equal protection, but declining to hold that the state could not operate *any* segregated institutions).

119. The continued judicial acceptance of sexually segregated prisons presents two analytical problems. The first was raised in Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972) (upholding differential penalties for men and women who escape from prison). The court noted that *because* men and women were housed by the state in separate facilities with different security characteristics, they were not "similarly situated" and therefore failed to meet the threshold requirement for an equal protection challenge. *But see* Commonwealth v. Stauffer, 214 Pa. Super. 113, 251 A.2d 718 (1969) (differential conditions of incarceration—men to jail, women to a penitentiary—held unconstitutional).

Second, proof of some kinds of sexual discrimination will be particularly difficult where the system is segregated, because the court might hesitate to condemn differences which might be the product of administrative style or penological theory. Since the courts are unlikely to hold unconstitutional every difference in treatment, they will have to develop standards for distinguishing permissible penological experimentation from illegal sexual discrimination. For example, a court might consider whether a given differential carried with it a connotation of inferiority, whether it was systematic and pervasive, and whether the right at issue was so fundamental that the classifications affecting it deserve strict scrutiny.

120. *See* pp. 1232-33 *supra*.

121. *See* p. 1235 *supra*.

122. 214 Pa. Super. 113, 251 A.2d 718 (1969).

123. Such a right might be derived either from equal protection theory or by extension from the recognized right to be free from physical harm in prison. *See* pp. 1260-61 *infra*.

3. Rehabilitative Programs and Personal Services

Scale-generated differences in the treatment of male and female inmates might be difficult to justify under an intermediate test, since they result from a state-created system of separate facilities. Clearly, the "separate but equal" argument will not be successful unless there *is* true equality. Yet, the state interest in fiscal economy, when truly significant, would probably bar the complete equalization of services and programs.[124]

Differentials based on perceived differences in the sexes might also survive challenge, *if* they satisfied the closer judicial scrutiny suggested by *Reed, York,* and *Daniel.* It is unlikely, however, that any disparity in the provision of necessities, such as medical or religious services, could be justified. A severe disparity in treatment personnel and programs would also probably be unconstitutional, unless the state could affirmatively establish that women have less need for such programs. The courts would, however, probably show greater deference to a defense that the types of vocational and industrial programs offered should reflect, if not sexual stereotypes themselves, at least the work preferences and realistic job opportunities that those stereotypes have engendered in the inmates and the society as a whole.

The precedents in this area suggest the parameters of the problem. On the one hand, the courts have traditionally granted the state broad discretion in allocating rehabilitative programs among its various institutions. Thus far, there seems to be no constitutional right to any particular rehabilitative scheme.[125] The availability of some programs at some facilities does not appear to produce an obligation to offer them to all prisoners. In fact, in *Wilson v. Kelley,*[126] a three-judge federal court rejected just such a contention:

> Humane efforts to rehabilitate should not be discouraged by holding that every prisoner must be treated exactly alike in this respect . . . to order the maximum for each and every person confined, as ordered by plaintiffs here, could be financially pro-

124. Such cases would undoubtedly turn on the size of the financial burden involved and the importance of the programs or services at stake.

125. Wilson v. Kelley, 294 F. Supp. 1005, 1012-13 (N.D. Ga. 1968), *aff'd per curiam,* 393 U.S. 266 (1969). A general lack of rehabilitative programs, when combined with deplorable physical and sanitary conditions, led a federal district court to declare the entire Arkansas prison system violative of the Eighth Amendment. Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1969). But beyond the rather minimal level required in that case, there seems to be no constitutional right to rehabilitative programs.

126. 294 F. Supp. 1005 (N.D. Ga. 1968) (three-judge court), *aff'd per curiam,* 393 U.S. 266 (1969).

> hibitive for this state and could result in a reduction of rehabilitative efforts rather than an implementation.[127]

On the other hand, such institutional differentiation has been viewed with closer scrutiny when the classification was sexual in nature. In *Dawson v. Carberry*,[128] female inmates of the San Francisco jail sued to join a work-furlough program from which they had been excluded. A federal district court ordered the women included, rejecting the state's argument that it lacked the resources to build comparable female facilities and that the smaller number of women did not justify such an expenditure in any event.

However, despite *Dawson*, the precedents suggest that an equal protection challenge must be directed not to the absence or inadequacy of any *one* program, but rather to the *overall* inferiority of the programs and services at the female prison. The principle enunciated in school cases, such as *Kirstein v. Rector & Board of Visitors*[129] and *Williams v. McNair*,[130] is that the sexes may be segregated, but that separate must be equal.[131]

D. *Reform under the Fourteenth Amendment*

The adoption of an intermediate standard of Fourteenth Amendment review would thus render unconstitutional some of the differential treatment of men and women in American correctional systems, but it would probably not force the actual integration of those systems. The most significant changes would undoubtedly come in the areas of rehabilitative programs and prisoner services, which would be comparatively inexpensive to equalize. On the other hand, it is unlikely that the courts would order the substantial expenditures necessary to standardize prison architecture or to provide a full range of specialized institutions for the relatively few women prisoners in each state.

III. The Equal Rights Amendment: Elimination of the Dual System

Although there is thus some possibility of reform under the Fourteenth Amendment, any substantial movement towards the equal treat-

127. *Id.* at 1012-13.
128. No. C-71-1916 (N.D. Cal., filed Sept., 1971), cited in Singer, *Women in the Criminal Justice System* (unpublished manuscript on file at Yale Law Library.)
129. 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court).
130. 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), *aff'd*, 401 U.S. 951 (1971).
131. *See* p. 1250 & note 118 *supra*.

ment of men and women in correctional institutions must await ratification of the proposed "Equal Rights" Amendment, which requires that:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.[132]

The import of this rather ambiguous mandate of "equality" must be drawn from the Amendment's legislative history[133] and the existing law of equal protection.

A. *Interpretation of the Amendment*

1. *The Absolute Approach*

The language of the ERA may be interpreted in three different ways: (1) that any sexual classification must rest on some "rational"

132. The House approved the ERA by a vote of 354-23. H.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. H 9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S.J. Res. 122, 92d Cong., 2d Sess., 118 CONG. REC. S 4612 (daily ed. March 22, 1972). For a summary of the pre-1971 legislative history of the Amendment, see S. REP. No. 92-689, 92d Cong., 1st Sess. 4-6 (1972) [hereinafter cited as S. REP. No. 92-689].

The Amendment has now been submitted to the states which have seven years to ratify. H.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. H 9392 (daily ed. Oct. 12, 1971). By March 1, 1973, twenty-eight of the required thirty-eight states had ratified the Amendment. Then, on March 15, 1973, Nebraska withdrew its approval, while Connecticut, which had previously rejected the Amendment, voted to ratify. N.Y. Times, March 16, 1973, at 1, col. 8. The effect of these two turnabouts is not entirely clear. The Supreme Court has followed a policy of non-intervention in the ratification process, declaring that the issue of vote changes is a "political question" for Congress and the Secretary of State. *See* Coleman v. Miller, 307 U.S. 433 (1939). Although a number of recent cases have narrowed the political question doctrine, they have cited *Coleman* with approval. *See* Powell v. McCormack, 395 U.S. 486, 518 (1969); Baker v. Carr, 369 U.S. 186, 214 (1961).

Congress has only been faced once with crucial changes in both directions. During ratification of the Fourteenth Amendment, Ohio and New Jersey first ratified and then withdrew their consent; North and South Carolina switched from rejection to ratification. The Secretary of State submitted the problem to Congress, which chose to include *all four* states among the twenty-eight affirmative votes required for ratification. *See* Coleman v. Miller, *supra,* at 448-49. Subsequent action by Congress and the Executive reinforces the view that only ratification is final. *See* Coleman v. Miller, *supra,* at 436 (Kansas' change to an affirmative vote on the proposed child labor amendment was accepted); at 449 n.25 (New York's withdrawal of its ratification of the Fifteenth Amendment was rejected); W. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 230 (1956) (Arkansas' switch to ratification of the Sixteenth Amendment and similar changes by Texas and Idaho with regard to the Twenty-second Amendment were all accepted by Congress).

This interpretation has also been supported by the commentators on the theory that, because Article V of the Constitution speaks only of "ratification," only the affirmative decision to ratify has any binding effect. As a result, a negative vote can always be changed, but ratification is final and not subject to recission. *See* J. JAMESON, ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING §§ 576-86 (1887); W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 329a (1910).

133. *See, e.g.,* Hurd v. Hodge, 334 U.S. 24, 32-33 (1948); Shelley v. Kraemer, 334 U.S. 1, 23 (1948); Slaughter House Cases, 83 U.S. 36 (1873). *But see Hearings Before Subcom. 4 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. 75-76 (1971) [hereinafter cited as *House Hearings*] (remarks of Senator Ervin); 118 CONG. REC. S 4377 (daily ed. March 21, 1972) (remarks of Senator Stennis).

basis; (2) that any such classification must be justified by some compelling state interest; or (3) that no state interest, no matter how compelling, can justify a sexual classification.

As noted above,[134] the first two interpretations are tests the courts now apply under the Fourteenth Amendment. The third view, first fully articulated by Professor Thomas Emerson and three law students in their article, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*,[135] holds that the law must deal with the individual attributes of the particular person, rather than make any broad sexual classifications. Differentiation on account of sex is thus totally precluded, regardless of whether it is "reasonable," beneficial, or justified by "compelling reasons."[136]

The ERA's legislative history clearly indicates that Congress adopted this third, absolute interpretation. The "rational basis" test was repeatedly rejected as providing an inadequate check on sexual discrimination.[137] Furthermore, as Senator Ervin explained, it would be nonsensical for Congress to propose an amendment to accomplish that which was already the law under the Fourteenth Amendment.[138]

Similarly, while Congress never explicitly rejected the "compelling state interest" test,[139] it did so implicitly through its clear support for the absolute interpretation.[140] The Senate Report captured the essence of the absolute interpretation when it declared that no sexual

134. *See* pp. 1244-48 *supra*.

135. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

Congresswoman Martha Griffiths, sponsor of the Amendment in the House, sent a copy of the article to all members of the House, noting, "It will help you understand the purposes and effects of the Equal Rights Amendment . . . . The article explains how the ERA will work in most areas of the law." *See* 118 CONG. REC. S 4250 (daily ed. March 20, 1972). Senator Ervin also characterized the article as "important legislative history." *Id.* at S 4264.

136. *House Hearings, supra* note 133, at 401 (testimony of Professor Emerson). *See also* Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 225 (1971).

137. *See* 118 CONG. REC. S 4263 (daily ed. March 20, 1972) (statement of Professor Paul Freund); Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAWYER 80 (1972).

138. *House Hearings, supra* note 133, at 82-83 (testimony of Senator Ervin). Professor Paul Freund made a similar observation more than a quarter century ago, interpreting an earlier version of the ERA. *See Hearings on S.J. Res. 61 Before a Subcom. of the Senate Comm. on the Judiciary*, 79th Cong., 1st Sess. 78-80 (1945). Professor Freund's analysis was recirculated by opponents of the Amendment. *See* 118 CONG. REC. S 4263 (daily ed. March 20, 1972).

139. The House indirectly rejected this standard: The "compelling state interest" test was embodied in the Wiggins Amendment, *see* H.R. REP. No. 92-359, 92d Cong., 2d Sess. 4 (1971) [hereinafter cited as H.R. REP. No. 92-359], which was rejected by the House. 118 CONG. REC. H 9390 (daily ed. Oct. 12, 1971). *See* note 142 *infra*.

140. Even if the "compelling state interest" test were used to implement the ERA, the practical effect would not differ significantly from use of the absolute rule. A state interest has only once been found sufficiently "compelling" to justify a classification along the lines of race or national origin, and then only in the context of national security in time of war. *See* Korematsu v. United States, 323 U.S. 214 (1944).

classification would be permitted under the ERA.[141] The Report also incorporated the "Separate Views" of fourteen members of the House Judiciary Committee,[142] which stated that:

> The basic premise of [the proposed Amendment] in its original form is a simple one. As stated by Professor Thomas Emerson . . . the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.[143]

The Senate Report characterized these "Separate Views" as stating "concisely and accurately the understanding of the Amendment . . . ."[144] A further indication of the intent of Congress to pass an "absolute" amendment[145] may be found in the repeated refusal of both houses to amend the ERA to add any qualifying or limiting language.[146]

141. The existence of a characteristic found more often in one sex than the other does not justify legal treatment of all members of the sex different [sic] from all members of the other sex. The same is true of the functions performed by individuals. The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions but not through a vast overclassification of sex. S. REP. No. 92-689, *supra* note 132, at 11-12.

142. The House Judiciary Committee amended the original joint resolution on June 22, 1971, by adding the Wiggins Amendment:

> This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States which reasonably promotes the health and safety of the people.

See H.R. REP. No. 92-359, *supra* note 139, at 5. Separate views to the subsequent Committee report were filed by fourteen representatives; minority views were filed by three. On October 12, 1971, the House rejected the Wiggins amendment and approved the resolution in its original form, as advocated by the authors of the "separate views." *See* 118 CONG. REC. H 9390 (daily ed. Oct. 12, 1971).

143. Separate views of fourteen members of the House Judiciary Committee, H.R. REP. No. 92-359, *supra* note 139, at 6. *See also* note 135 *supra*.

144. S. REP. No. 92-689, *supra* note 132, at 11.

145. An absolute interpretation would perhaps be unquestioned were it not for comments by Congresswoman Martha Griffiths, a key Amendment supporter. Her position was that the purpose of the Amendment is to write women into the Fourteenth Amendment. *Hearings on S.J. Res. 61 and S.J. Res. 231, Before The Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess. 225 (1970) [hereinafter cited as *Senate Hearings*]. *House Hearings, supra* note 133, at 51. During the Committee hearings in the House, she had the following exchange with Congressman Wiggins:

> MR. WIGGINS. I think it is important that we sort of nail down the breadth of this word "Equality." As I understand it from the amendment, it is not absolute but will admit of rational exception.
>
> MRS. GRIFFITHS: That is right.

House Hearings, supra note 133, at 46.

However, Congresswoman Griffiths' concept of rational exceptions may not in fact be inconsistent with the absolute approach: She may have been referring to rational *exceptions* from the absolute equality called for by the Amendment, not "rational classifications" as that term is understood in traditional equal protection law. The two exceptions she listed were unique physical characteristics and privacy, *see House Hearings, supra* note 133, at 46, which are the same ones Professor Emerson would incorporate into the ERA. *See* pp. 1257-61 *infra*.

146. Unlike the House Committee, which had adopted the Wiggins Amendment, *see* note 142 *supra*, the Senate Judiciary Committee rejected six proposed amendments prior to reporting favorably the joint resolution. *See* S. REP. No. 92-689, *supra* note 132.

2. *Exceptions*

Two of the ERA's leading opponents also went to great lengths to stress the "absolute" nature of the Amendment. Senator Ervin rejected any possibility of a "flexible" interpretation and claimed that the ERA would make men and women identical legal beings.[147] Professor Paul Freund similarly characterized the Amendment as a "yardstick of absolute equality."[148] However, these fears go beyond the intent of Congress; certain exceptions are, in fact, accommodated by the ERA.

a. *Unique Physical Characteristics*

Under Professor Emerson's interpretation, the Amendment would not prohibit legislation dealing with physical characteristics unique to one sex.[149] He explains that such legislation is permitted because

Senator Ervin then offered the following qualifying amendments from the floor:

This article shall not apply to any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex.

118 CONG. REC. S 4372-74 (daily ed. March 21, 1972) (withdrawn by Senator Ervin).

This article shall not impair, however, the validity of any laws of the United States or any State which exempts women from compulsory military service.

118 CONG. REC. S 4374-94 (daily ed. March 21, 1972) (rejected 73-18).

This article shall not impair the validity, however, of any laws of the United States or any State which exempt women from service in combat units of the Armed Forces.

118 CONG. REC. S 4395-4409 (daily ed. March 21, 1972) (rejected 71-18), reintroduced and again rejected, 118 CONG. REC. S 4409-28 (daily ed. March 21, 1972) (75-11).

This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women.

118 CONG. REC. S 4531-37 (daily ed. March 22, 1972) (rejected 77-14).

This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers the responsibility for support of their children.

118 CONG. REC. S 4545-51 (daily ed. March 22, 1972) (rejected 71-17).

This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, or boys or girls.

118 CONG. REC. S 4543-45 (daily ed. March 22, 1972) (rejected 79-11). This last amendment was voted down not because Congress wanted to limit the right of privacy but because it believed that privacy could be balanced against the ERA as originally worded. *See House Hearings, supra* note 133, at 403 (testimony of Professor Emerson); 118 CONG. REC. S 4544-45 (daily ed. March 22, 1972) (remarks of Senators Bayh and Cook). See note 157 *infra* on the accuracy of this belief.

147. *House Hearings, supra* note 133, at 82-83.

148. *See* 118 CONG. REC. S 4263 (daily ed. March 20, 1972).

149. Brown, Emerson, Falk & Freedman, *supra* note 135, at 893. *See also House Hearings, supra* note 133, at 402, where Professor Emerson explained:

[T]he equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. . . . Such legislation does not . . . deny equal rights to the other sex. So long as the characteristic is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment, for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

Professor Emerson cites the following as laws falling within the exception: laws concerning wet nurses and sperm donors; laws establishing medical leave for childbearing

it does not deny equal rights to the other sex. This exception is, however, limited to physical characteristics and does not extend to psychological differences, since the latter cannot be said with any assurance to be truly unique to one sex.[150] Moreover, the exception is to be strictly limited to situations where the legislation is directly and narrowly related to the characteristic in question.[151]

Congress clearly intended to include this exception in its interpretation of the ERA. The Senate Report expressly stated that the Amendment would not prohibit reasonable classifications based on characteristics unique to one sex,[152] and Congresswoman Griffiths emphasized in her testimony that such a characteristic must be physical.[153]

b. *Collateral Constitutional Rights*

Professor Emerson's interpretation also recognizes that the ERA must be harmonized with other provisions of the Constitution.[154] Two

(but not for childrearing, since both men and women are physically capable of rearing children); laws punishing forcible rape; and laws relating to the determination of fatherhood. Brown, Emerson, Falk & Freedman, *supra* note 135, at 894.

150. Brown, Emerson, Falk & Freedman, *supra* note 135, at 893.

151. Professor Emerson suggests six factors to be weighed in determining whether such relationship exists: (1) the proportion of men or women who actually possess the characteristic; (2) the relationship between the characteristic and the problem; (3) the proportion of the problem attributable to the unique physical characteristic; (4) the proportion of the problem eliminated by the solution; (5) the availability of less drastic alternatives; (6) the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution. *Id.* at 894-96.

152. The Report explains:

> The legal principle underlying the equal rights amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

S. REP. No. 92-689, *supra* note 132, at 12.

153. *House Hearings, supra* note 133, at 40. The concept of "unique physical characteristic" is not new to the law. An analogous concept is found in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970). Title VII of that Act outlaws sexual discrimination in employment, but is qualified "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise." Section 703 (e), 42 U.S.C. § 2000e-2(e) (1970).

The precise meaning of "bona fide occupational qualification" with regards to sex has not yet been determined. The Equal Employment Opportunity Commission has adopted a narrow construction, saying that preference in employment to one sex is permissible only "[w]here it is necessary for the purpose of authenticity or genuineness," as in the case of actors or actresses. 29 C.F.R. § 1604.1(a)(2) (1972).

154. *See* Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 225, 231 (1970). Senator Ervin argued that a constitutional amendment invalidates other constitutional provisions if such provisions are inconsistent with the more recent amendment. S. REP. No. 92-689, *supra* note 132, at 46 (Minority Views of Senator Ervin). The Senator's view may well be correct, but his further conclusion that the ERA cannot be reconciled with the right of privacy is untenable. The language of the Amendment itself is extremely vague, and certainly does not expressly amend or repeal the privacy right. *See* pp. 1253-54 *supra*. The courts would therefore have to look to legislative history to determine whether the ERA *as interpreted* is in conflict with the right of privacy; they would find that the majority of Congress intended that the Amendment not deprive any person of his right to privacy. *See* note 156 *infra*.

existing constitutional rights are of special significance to the operation of prisons: the right of privacy and the prohibition against cruel and unusual punishment.

Despite claims to the contrary by opponents of the ERA,[155] Congress clearly passed the Amendment in the belief that it would be balanced against the right of privacy, and that as a result the sleeping and toilet facilities of public institutions could continue to be sexually segregated.[156] This conclusion is by no means self-evident, since no court has yet found a right of sexual privacy with regard to such facilities, much less extended such a right to prisoners. Nevertheless, the right of an inmate to disrobe and perform personal functions out of the presence of inmates of the opposite sex is probably inferrable from the reasoning of earlier privacy and prisoners' rights cases, at least where no legitimate security or rehabilitative interests dictate to the contrary.[157]

155. Senator Ervin's position is explained in his Senate Minority Report:

> I believe that the absolute nature of the Equal Rights Amendment will, without a doubt, cause all laws and state-sanctioned practices which in any way differentiate between men and women to be held unconstitutional. Thus, all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. . . . The proponents of the ERA mention that the Constitutional right to privacy will protect and keep separate items such as public restrooms; however, this assertion overlooks the basic fact of constitutional law construction: The most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exception for elements of publically imposed sexual segregation on the basis of privacy between men and women.

S. REP. No. 92-689, *supra* note 132, at 45-46.

Professor Freund took a similar position. He testified before the Senate Judiciary Committee that the strict model of racial equality would require that there be no segregation of the sexes in prisons, reform schools, public restrooms, and other public facilities. *See Senate Hearings, supra* note 145, at 74. *See also* Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 234-40 (1971).

156. The Senate Report states that the "constitutional right of privacy established by the Supreme Court in Griswold v. Connecticut" would permit a separation of the sexes with respect to such places as public toilets and the sleeping quarters of public institutions, even after passage of the Amendment. S. REP. No. 92-689, *supra* note 132, at 12. The proponents of the ERA also noted the privacy exception throughout the hearings and floor debate. *See, e.g.*, 118 CONG. REC. S 4394 (daily ed. March 21, 1972) (remarks of Senator Gurney); *Senate Hearings, supra* note 145, at 97 (remarks of Senator Cook); *House Hearings, supra* note 133, at 40 (remarks of Congresswoman Griffiths), 86-87 (remarks of Congressman Mikva); 118 CONG. REC. H 9386 (daily ed. Oct. 12, 1971) (remarks of Congressman Ashley).

In addition to this constitutional right to privacy, the Senate Report also refers to the "traditional power of the state to regulate cohabitation and sexual activity by unmarried persons." S. REP. No. 92-689, *supra* note 132, at 12. This power, according to the Report, would permit the state to segregate the sexes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories and military barracks. However, except for a few cryptic references during the House Hearings, *see, e.g., House Hearings, supra* note 133, at 289-90, 305, there is no other mention of the doctrine in the legislative history. The legal basis for the doctrine, the general police power, is, of course, as pervasive as any of the reserved powers of the states, but it is not of constitutional dimension. Consistent interpretation of the ERA requires that no state interest, not even under the police power, be allowed to justify a law or regulation containing a sex-based classification.

157. Congress based this perceived right of sexual privacy on the Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965). *See* note 156 *supra*. The

Although there is no discussion of the Eighth Amendment[158] in the legislative history of the ERA, that constitutional right cannot be overlooked in an analysis of the rights of prison inmates. The courts have held that prisoners have an Eighth Amendment right to be

Court has since expanded and clarified the right of privacy, *see* Roe v. Wade, 93 Sup. Ct. 705 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972), but it has not yet been called on to determine whether that right encompasses a prisoner's unwillingness to disrobe or shower in the presence of the opposite sex. The Ninth Circuit, however, has indicated that the *un*incarcerated person has such a right. In Ford v. Story, 324 F.2d 450 (9th Cir. 1963), in which a police officer photographed the nude body of a rape victim over her objection and then circulated the photographs among the stationhouse personnel, that court said:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.

Id. at 455. On the nexus between the right of privacy and basic human dignity, see Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, in 1 PRACTISING LAW INSTITUTE, PRISONER'S RIGHTS 147 (1972).

Of course, prisons are not noted for the degree to which they protect the dignity and self-respect of their inmates. *See* Singer, *supra*, at 149-51. However, elements of personal freedom which are protected by the Constitution can only be denied to prisoners if they conflict with compelling security or other penal interests. *See* Barnett v. Rodgers, 410 F.2d 995, 1003 (D.C. Cir. 1969) and cases cited in the last paragraph of note 89 *supra;* 1 PRACTISING LAW INSTITUTE, PRISONER'S RIGHTS 117 (1972); Tucker, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 508-09 (1971). Moreover, constitutional rights may only be abridged if there exist no less drastic means of satisfying such penal interests. *See* Barnett v. Rodgers, *supra*, at 1003; PRACTISING LAW INSTITUTE, *supra*, at 117.

These principles have led one commentator to conclude that a wide variety of current prison practices violate the inmate's constitutional right of privacy, *See* Singer, *supra*. Whether or not the courts accept this position, they would probably recognize that no significant prison interest would be served by the sexual integration of institutional living quarters. On the contrary, security and rehabilitation would probably demand, and the states would probably so require on their own, the same segregation dictated by the right of privacy. *See* pp. 1249-50 *supra;* Barnett v. Rodgers, *supra*, at 1002: "Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life."

Congress therefore could have reasonably found that prisoners retain a right to disrobe and perform personal functions out of the presence of inmates of the opposite sex, and that this right would require the segregation of living quarters in otherwise integrated institutions. However, even if the courts, as final arbiters of constitutional interpretation, accept this conclusion, they will find little guidance in the legislative history concerning the manner in which privacy and the ERA would interact in particular situations. On the degree to which living quarters would have to be separated, *see* note 189 *infra*.

Concerning the persons affected by the right of privacy, it is interesting to note that the male institution at San Quentin now employs two female guards, whose duties have thus far been limited to the gun towers, visiting rooms, and gates. Telephone conversation with Lee E. DeBord, Information Officer, California State Prison at San Quentin, March 30, 1973. Even this limited use of female guards, who *may* be called on to conduct skin searches and oversee showers, is being challenged in court by a male inmate. N.Y. Times, March 30, 1973, at 33, col. 8. It seems clear that certain treatment personnel, such as physicians and perhaps even counselors, must be allowed greater "intimacy" with the prisoner than would be afforded a fellow inmate. Custody officers appear to fall somewhere between these two extremes on a continuum of permissible "invasions." In each case, the court should balance the degree of humiliation (loss of dignity and thus privacy) involved, the prison's interest in causing that humiliation, and the feasibility of the less drastic method of having same-sex staff conduct the "invasion" at issue.

158. U.S. CONST. amend. VIII.

free from physical abuse at the hands of both state officials[159] and fellow prisoners.[160] The latter right stems from the affirmative duty of prison officials to minimize violence among inmates.[161] Such constitutional principles must also be accommodated within the framework of the ERA.

B. *Problems of Application*

1. *Would "Separate but Equal" Treatment Be Permitted Under the ERA?*

In *Brown v. Board of Education*,[162] the Supreme Court invalidated the doctrine of "separate but equal" in the racial context on the grounds that separate, by its very nature, could not be equal. As noted above, however, the Court has not yet made the same determination concerning sexual segregation; nevertheless, the ERA would appear to compel such a result.[163]

The framework developed by Professor Emerson simply does not

159. Wiltsie v. California Dept. of Corrections, 406 F.2d 515 (9th Cir. 1968) (beating with fists and billy clubs); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), *modifying* 268 F. Supp. 804 (E.D. Ark. 1967) (whipping with strap).

160. Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). It should be noted that both *Kish* and *Holt* dealt in part with claims of homosexual rape, a problem analogous to that of sexual assault in integrated institutions.

161. In Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), a federal district court held that a wide range of practices and conditions at the Mississippi State Penitentiary constituted a deprivation of Eighth Amendment rights. The court held that the inmates had been subjected to cruel and unusual punishment because of the failure of penitentiary officials to provide adequate protection against physical assaults, abuses, indignities, and cruelties by other inmates, by placing excessive numbers of inmates in barracks without adequate classification or supervision, and by assigning custodial responsibility to incompetent and untrained inmates. *Accord*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

162. 347 U.S. 483 (1954).

163. A "freedom of choice" arrangement cannot be so easily rejected. In the context of school segregation, the Supreme Court refused to accept a freedom of choice plan, but only because in the instant case such plans had failed to "effectuate conversion of a state-imposed dual system to a unitary, nonracial system." Green v. County School Board, 391 U.S. 430, 440-41 (1968). Arguably, a state would not be discriminating against either sex if it maintained three equally desirable institutions—one for men, one for women, and one mixed—and gave each inmate the choice of incarceration in an integrated or a segregated institution.

Such an arrangement would, however, be both doctrinally and practically unacceptable. While the Court in *Green* conceded the theoretical legality of "freedom of choice" plans, it was referring to a system in which each pupil could select among *all* institutions in the district. The designation of one institution as "male" and another as "female" must be seen as inherently inimical to the "unitary" system envisioned in *Green*, and would also appear to be a sexual classification at odds with the basic principle of the ERA. Furthermore, the single-sex prisons would have to be equally desirable to afford each sex an "equal" choice, and the integrated prison would have to be at least as desirable to insure that the state was not covertly encouraging segregation. The cost of maintaining such "equal" institutions would undoubtedly deter all but the largest states, which would also probably be deterred by the degree to which such a tripartite system would limit the geographic and rehabilitative classification of inmates.

accommodate a "separate but equal" approach, since that doctrine, just as in the case of race, could be used to keep one sex in a subordinate position.[164] Although there has not been extensive study in the area, the existing evidence does tend to show that sexually separate facilities are rarely equal.[165]

Although most of the debate before Congress concerning sexual segregation dealt with schools,[166] there is evidence that Congress contemplated and, by its refusal to revise the ERA, intended that the Amendment would require sexual integration of all public institutions, including prisons.[167] The constitutional exceptions described above would not bar such integration: Privacy does not require the segregation of entire institutions,[168] and the right to be secure from physical abuse can also be accommodated, as has been required in the racial context,[169] in far less drastic ways.

2. *Equalization Up or Down?*

Having established that integrated facilities would be required by the ERA, the question becomes whether the conditions of the inte-

164. Brown, Emerson, Falk & Freedman, *supra* note 135, at 902-03.

165. *See* pp. 1231-43 *supra*. An analysis of coordinate "brother-sister" colleges reveals similar findings. *See* C. JENCKS & D. REISMAN, THE ACADEMIC REVOLUTION 305 (1968). *See also House Hearings, supra* note 133, at 272 (remarks of Dr. Bernice Sandler).

166. Congresswoman Martha Griffiths totally rejected the notion of "separate but equal" in this context. *House Hearings, supra* note 133, at 47.

167. Congressman Edwards questioned then Assistant Attorney General Rehnquist as to whether the various correctional institutions throughout the country would have to be integrated if the ERA were enacted. Mr. Rehnquist replied that the requirement of integration would be "a very permissible interpretation." *House Hearings, supra* note 133, at 3220. In a subsequent letter to Congressman Edwards, Mr. Rehnquist qualified his testimony by explaining that the question could not be fully answered with any certainty:

> [A]t a minimum it would appear permissible under the proposed amendment to separate men and women to the extent necessary to prevent further crimes, such as rape and prostitution, as male prisoners are now to some degree separated to prevent homosexual assaults. It has been further suggested by supporters of the amendment that separation would be permissible to the extent necessary to protect a competing right of privacy. To what extent recognition of the necessity of some degree of separation of some prisoners could be generalized to permit separation of all prisoners or maintenance of separate systems is, we believe, uncertain.

Letter reprinted in *House Hearings, supra* note 133, at 329.

Professor Philip Kurland, an opponent of the ERA, testified that the Amendment would make it unconstitutional for the federal government or state governments to maintain separate prisons for men and women and separate reformatories for boys and girls. *See Senate Hearings, supra* note 145, at 99. However, Professor Kurland also noted that there are some, albeit old fashioned, notions of privacy that might properly justify a policy of "separate but equal" facilities. *See* 118 CONG. REC. S 4570 (daily ed. March 22, 1972).

Congressman Edwards noted that the Director of the U.S. Bureau of Prisons responded very affirmatively to a question concerning the possible integration of prisons under the Amendment. The Director felt that the prisons should be integrated now—"for good penology, good corrections and decent living . . . ." *House Hearings, supra* note 133, at 306.

168. *House Hearings, supra* note 133, at 402 (testimony of Professor Emerson). *See* note 189 *infra*.

169. *See* note 115 *supra*.

grated facilities would reflect an equalization up to or down from the best of the present institutions. As a matter of constitutional law, the courts, when dealing with an underinclusive discriminatory law or practice, can select either remedy. As Justice Harlan explained,

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.[170]

Under the ERA, Congress clearly intended that benefits be extended whenever possible. The Senate Report states that "those laws which provide a meaningful protection would be expanded to include both men and women."[171] A similar procedure has already been required in the areas of employment discrimination[172] and the equalization of other personal benefits.[173]

In the prison context, however, a problem arises from the great numerical disparity between male and female inmates. If men are found to be receiving special benefits or better treatment, it seems rather clear that both theoretically and practically the proper remedy would be to extend those benefits to *all* inmates, including the relatively few women, in the new coeducational institutions. But the converse situation is somewhat more difficult: An extension of benefits now enjoyed by the female inmate population to the far larger male population might well put an enormous economic burden on the states,[174] and it seems unlikely that the courts would mandate

170. Welsh v. United States, 398 U.S. 333, 361 (1970) (concurring) (footnote omitted). *See also* Skinner v. Oklahoma, 316 U.S. 535, 543 (1943); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931).

171. S. REP. No. 92-689, *supra* note 132, at 15-16. Congresswoman Griffiths also argued that many laws which treat men and women differently would not be invalidated, but would be expanded so as to include the previously disadvantaged sex:

> Under the equal rights amendment courts would follow this established procedure of invalidating only that part of a statute which offends the Constitution, while allowing the statute to stand as modified. . . . Minimum wage laws which cover only women would be expanded to apply also to men.

House Hearings, supra note 133, at 40-41.

172. *See, e.g.*, Potlatch Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970), involving a state statute requiring overtime pay for women. When the male workers sued for equal treatment, Potlatch sought to have the state law nullified. The court ruled instead that the overtime benefits must be extended to men. *See also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

173. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death benefits extended to previously excluded illegitimate children); Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (access to institutions of higher education extended to include previously excluded classes). *See generally* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969).

174. As noted above, *see* note 113 *supra*, annual state budgets may not really reflect the magnitude of this burden, since they do not reveal the capital expenditure differen-

such a remedy. Yet since the ERA would require a program of equalization—whether it be up or down—the states and the courts would probably have to compromise in adapting the old male prisons to the needs of coeducation, equalizing up where feasible and down where necessary. The "better" female institutions would, of course, still be available, to be used perhaps as minimum security facilities for inmates of both sexes.

C. *The Sexually Integrated Institution*

Thus, ratification of the ERA would require sexually integrated prisons which incorporate, wherever feasible, the best aspects of the previously segregated institutions. Such a system would dictate changes in many aspects of prison life and administration.

Obviously, those treatment differences which result from economies of scale[175] would be eliminated automatically by the integration of the institutions. For example, men and women would have equal access to the medical facilities and religious programs provided at a particular institution.[176] The problem of remoteness would be similarly eliminated: While a given facility might still be remotely situated, the men and women sent there would be equally disadvantaged. Many other problems would not, however, be solved by the simple act of integration.

1. *The Classification Process*

Where a state maintains only one institution for all male offenders and none for its female felons,[177] the process of integration would be relatively straightforward: All offenders would be housed in that one institution. However, in those states where different institutions are presently set aside for different categories of male offenders, the classification process would have to be revised to accommodate women on an equal basis.[178] The ERA would require that the classification

tial which originally went into providing women with "campus" facilities while creating fortresses for the incarceration of men. If the states were required to provide men as well as women with private rooms and other amenities in facilities which still meet perceived security needs, the cost might well be insuperable.

175. *See* pp. 1231-37 & note 174 *supra*.

176. The enormous costs involved in providing medical facilities would probably make it impractical for the state governments to equalize medical treatment in all institutions up to the highest level which is now available anywhere in the system. But if a particular institution were too small to support an elaborate medical facility, there would be no sex-based inequality. Rather, the men and women in it would be equally deprived.

177. *See* notes 11 and 22 *supra*.

178. A sexual integration plan which merely allocated women proportionately throughout the system would be unacceptable. Under the ERA, men and women would have to be treated equally; the classification standards which exist for men would have to be applied to women as well.

standards employed be objective and sexually neutral in both application and effect.[179]

Because of the vastly greater number of men sentenced to confinement,[180] the application of a sexually-neutral classification scheme would raise certain problems. There is some danger that application of such a sexually neutral scheme would result in grossly *unequal* treatment for some women. For example, in a particular state system, a female inmate might find herself one of only two or three women in an "integrated" population with hundreds of men.[181] Such gross numerical disparity may run afoul of the Eighth Amendment prohibition against cruel and unusual punishment,[182] the inmate's right of privacy,[183] and her right to equal protection of the laws.[184] Balancing these rights in urgent situations, the courts might allow a woman to choose not to be confined in a particular institution. Incarcerating at least five or ten women in each institution should, however, provide sufficient same-sex companionship without significantly hindering the process of integration.

179. For example, acceptable standards would include nature of crime, length of sentence, region of the state, and age. Psychological factors could also be taken into account, so long as they were determined on the basis of demonstrably objective, sex-neutral tests administered to the *individual* inmate. The use of subjective judgments or stereotyped classifications concerning an entire sex group would be unacceptable because of the danger of reintroducing sex-based classifications into the system. For example, female inmates as a group are frequently characterized as "less violent," "less dangerous," and "less prone to escape" than their male counterparts. *See, e.g.*, Wark v. State, 266 A.2d 62 (Sup. Jud. Ct. Me. 1970), *cert. denied*, 400 U.S. 952 (1970). A classification scheme based on such generalizations could conceivably result in classification of all females as "minimum security" risks without reference to their individual characteristics. Under the ERA, the only legitimate question would be whether each *individual* woman belonged in minimum security. The ERA would thus mandate what modern penology requires—individual classification. *See generally* O. GIBBONS, CHANGING THE LAW-BREAKER (1965).

180. *See* note 5 *supra*.

181. The state of Hawaii, for example, had only four women and approximately 260 men sentenced to confinement as of the summer of 1972. Interview with Lykke, *supra* note 13.

182. Deprivation of same-sex companionship during the entire period of incarceration and of *all* companionship during those periods in which privacy considerations demand sexual segregation, *see* p. 1266 *infra*, might be held to be a violation of the Eighth Amendment, since it would be arbitrarily imposed on female inmates because of their sex. *Cf.* Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86 (1958).

183. *See* p. 1259 *supra*.

184. Within a sexually integrated institution, women would represent not merely a minority group, but a minority which had been set apart for certain purposes, *e.g.*, sleeping and showering. This differentiation might give rise to special needs, *see* note 182 *supra*, the recognition of which would be justified in order to guarantee the "equal treatment" of this minority group. Racial minorities with needs arising from their particular religious beliefs have been granted similar special treatment. *See, e.g.*, Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (prison administration must have "compelling justifications" for denying to Black Muslims meals that comport with their dietary creed).

2. *The Physical Environment*

In terms of physical facilities and the general prison environment, most women now receive better treatment than their male counterparts.[185] The ERA would eliminate this differential by subjecting both men and women to the same physical surroundings in sexually integrated institutions. Ideally, the equalization would be up to the level presently enjoyed by the women. But in most states, this would require either renovation of almost all existing male institutions or the construction of all new facilities designed to meet the high standards now found in most female prisons. Again, if the state faces an economic roadblock to equalizing up, the ERA would tolerate equalization down to a lower, more economically feasible level.[186]

As discussed above, sexual integration of the nation's correctional institutions need not result in heterosexual cohabitation, since the constitutional right to individual privacy[187] would probably require the authorities to provide sexually separate facilities for disrobing, sleeping, and performing personal functions.[188] Although the degree to which these facilities would have to be separated in order to meet constitutional requirements is not precisely defined, a state would probably be permitted to look to "societal mores" in interpreting the right of privacy in public institutions.[189]

185. *See* pp. 1237-38 *supra.*
186. *See* p. 1263 *supra.*
187. *See* notes 156-57 *supra.*
188. Because privacy is an *individual* right, difficulties might arise should some inmates wish to waive it. Congress did not adequately address the problem of waiver under the ERA; the only specific discussion of the matter was a dialogue between Congressman Wiggins and Professor Emerson during the House Hearings. *See House Hearings, supra* note 133, at 403-05. However, Congress undoubtedly did not intend to sanction heterosexual cohabitation and had assumed that the privacy exception would cover it. *See* note 156 *supra.*

In practice, that assumption would probably be borne out. First, even an effective waiver would not necessarily result in cohabitation. There is, of course, no right to cohabit with the opposite sex. Rather, waiver would at most force the state to assign the sleeping quarters of those who waive on a random basis. Moreover, it is possible that rights such as privacy which must be enforced through a state administrative mechanism cannot be waived on an individual basis. Arguably, this justification for barring waiver is particularly compelling in the prison context, because of the degree to which administrative decisions are tied to security needs and the difficulty of determining the voluntariness of a waiver in a coercive prison atmosphere.

If waiver should be permitted, sex offenders would not be permitted to opt for cohabitation with the opposite sex, since the state's decision to segregate in that instance is based on the offense and not on any sexual classification.

189. Brown, Emerson, Falk & Freedman, *supra* note 135, at 902. *See also House Hearings, supra* note 133, at 46 (remarks of Congressman Wiggins). Although the use of societal mores to define the new privacy right has never been expressly approved by the Court, both Justice Goldberg, concurring in *Griswold,* and Justice Stewart, concurring in *Roe,* noted the changing traditions and concepts of society in developing the constitutional right of privacy from, respectively, the Ninth and Fourteenth Amendments. *See* Griswold v. Connecticut, 381 U.S. 479, 493 (1965); Roe v. Wade, 93 S. Ct. 705, 735 (1973). It thus does not seem unreasonable to conclude that Congress and ul-

3. *Rehabilitation*

Under the ERA, the current disparity in both the quantity and quality of rehabilitative programs available to men and women[190] would have to be eliminated. Since the ERA also requires the integration of institutions, however, such equalization should create no significant economic costs. The Amendment would not require that every institution in a state offer identical rehabilitative programs, but rather only that both sexes within any given institution be provided equal access to all programs within that institution.[191] Assignments to prison industries and other work details would also have to be made on a sexually neutral basis.[192]

IV. Conclusion

Patterns of sexual discrimination exist throughout the prison systems of the United States. Every state exhibits differences related to both scale and sexual stereotypes in the treatment of its male and female offenders. The discrimination involved in differential treat-

timately the courts, in giving content to that right, will look in part to current social mores.

In prisons, separate cells or sleeping units for the sexes would seem to be a necessity under prevailing social mores. Whether or not these separate units would have to be physically remote from those of the other sex would probably be an appropriate inquiry for the legislature or prison administration. However, the ultimate decision on such questions of privacy would be constitutional ones reviewable by the courts. *See House Hearings, supra* note 133, at 403 (testimony of Professor Emerson).

The institutions which are presently sexually integrated provide some indication of the existing mores in this area. For example, the Pennsylvania State Prison at Muncy, formerly all female, now houses a few men. According to the warden, the only facilities which remain segregated are the sleeping, shower, and toilet facilities. The prison is of the cottage type and the men reside in their own cottage. *Survey, supra* note 2. A similar arrangement has been adopted at the Fort Worth federal facility, N.Y. Times, July 8, 1972, at 27, col. 1, and the newly integrated institution at Framingham, Massachusetts, Hartford Courant, April 12, 1973, at 7, col. 2.

190. *See* pp. 1241-43 *supra.*

191. Physical integration of the institutions would not necessarily guarantee equal access. For example, the Mississippi State Penitentiary at Parchman is physically integrated to the extent that men and women are housed in the same geographic area. However, the women are not permitted to participate in the variety of vocational programs that are available to the men. Interview with Sgt. David Jones, Mississippi State Penitentiary, Aug. 23, 1972, on file with the *Yale Law Journal.*

192. The relatively small number of women in each state's prison system should not pose a serious problem in this process of equalization. Even the present all-male institutions usually offer a variety of female-stereotyped programs and industries, *see* Appendices II and III, so women who preferred such activities would probably still find them available in the sexually integrated facilities. In addition, a deliberate attempt by prison administrators to disproportionately satisfy male preferences and slight female preferences would constitute an impermissible sex-based classification. *See* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (prison officials, in selecting appropriate reading material for inmates, could not arbitrarily screen out the preferences of black prisoners).

ment varies considerably, but substantial discrimination against both men and women is widespread.

The Fourteenth Amendment has had little impact on the elimination of these patterns of sexual discrimination, and does not seem likely to bring about significant reform. But ratification of the proposed Equal Rights Amendment should require that, within certain constitutional limitations, the nation's prisons be integrated so as to insure equality of treatment for both men and women inmates.

APPENDIX I

State	No. of inmates/ No. of staff		No. of inmates/ No. of CO's†		% of CO's of different sex than inmates	
	Female prison	Male prisons	Female prison	Male prisons	Female prison	Male prisons
Alabama	2.6	5.8	3.8	8.1	15	0
California	2.0	4.8	5.1	8.7	32	0
Connecticut	1.4	2.3	1.4	3.3	10	0
Illinois	1.4	3.1	2.7	4.9	26	0
Indiana	1.7	4.6	3.4	7.1	0	0
Michigan	3.2	4.1	3.8	6.8	n.a.	0
Minnesota	1.0	2.2	1.8	4.6	17	2
Mississippi*	7.4	7.4	11.5	11.5	50	0
Missouri	2.4	3.6	2.8	6.1	7	0
Nebraska	1.4	2.6	2.8	4.4	52	0
New York	1.0	2.9	2.1	4.7		0
Ohio	1.4	3.0	4.0	5.0	26	1
Oregon	3.7	2.8	5.7	5.7		0
Pennsylvania	1.4	2.8	2.8	4.4	16	0
Washington	1.0	2.7	1.7	4.6		0

Source: *ACA Directory, supra* note 2, and *Survey, supra* note 2. Where state has more than one male prison, figures represent the average for those prisons.
† Correctional Officers.
*Single institution contains both men and women in wholly segregated sections.

APPENDIX II

VOCATIONAL PROGRAMS

MALE PRISONS	Air Cond. Rep.	Arts & Crafts	Auto Body	Auto Mech.	Baking	Barbering	Bookbinding	Brick Masonry	Build. Maint.	Build. Trades	Cabinet Making	Carpentry	Carpet Laying	Chemistry	Computer Maint.	Cooking	Data Proc.	Diving	Drafting	Electronics	Eng. & Appl. Rep.	Farming	Farm Equip.	Forestry	Furniture Mfr.	Graphics	Horticulture	Laundry	Leather Work	Machine Shop	Meat Cutting	Metal Work	Off. Mach. Rep.	Optics	Painting	Plumbing	Printing	Radio/TV Rep.	Recreation Aide	Silk Screening	Shoe Repair	Steam Fitting	Tailoring	Watch Repair	Welding	Clerical	Cosmetology	Dental Tech.	Floral Design	Food Service	Garment Mfr.	Housekeeping	IBM Keypunch	Nurses' Aide	TOTAL
Frank Lee (Ala.)			x	x		x		x			x									x	x				x																		x												9
Atmore			x					x															x																					x												5
Draper			x	x		x		x			x									x	x				x																		x												9
Holman																																																								0
Cal. Corr. (Cal.)	x			x	x						x										x																																			12
Cal. Inst.												x						x			x								x																									6
Folsom				x		x													x										x	x	x																								7
San Quentin						x	x													x										x	x	x																							13
Cheshire (Conn.)				x	x						x	x														x				x	x																						6
Osborn				x	x												x																																					7
Somers					x						x						x				x																																3
Menard (Ill.)						x						x								x						x							x																				9
Pontiac					x	x										x				x	x																																7
Statesville					x	x					x					x				x																																	7
State Farm (Ind.)					x														x																																		3
State Pris.					x	x		x				x									x				x																												8
State Ref.					x	x		x												x					x																												9
Ionia (Mich.)					x																x																																5
Jackson					x							x								x																																	6
State Pris. (Minn.)					x	x									x					x																																11
State Ref.					x	x		x				x								x					x																												17
Parchman (Miss.)					x			x				x								x			x																														9
Int. Ref. (Mo.)					x							x								x																																	9

APPENDIX II—Continued

VOCATIONAL PROGRAMS

MALE PRISONS	Air Cond. Rep.	Arts & Crafts	Auto Body	Auto Mech.	Baking	Barbering	Bookbinding	Brick Masonry	Build. Maint.	Build. Trades	Cabinet Making	Carpentry	Carpet Laying	Chemistry	Computer Maint.	Cooking	Data Proc.	Diving	Drafting	Electronics	Eng. & Appl. Rep.	Farming	Farm Equip.	Forestry	Furniture Mfr.	Graphics	Horticulture	Laundry	Leather Work	Machine Shop	Meat Cutting	Metal Work	Off. Mach. Rep.	Optics	Painting	Plumbing	Printing	Radio/TV Rep.	Recreation Aide	Silk Screening	Shoe Repair	Steam Fitting	Tailoring	Watch Repair	Welding	Clerical	Cosmetology	Dental Tech.	Floral Design	Food Service	Garment Mfr.	Housekeeping	IBM Keypunch	Nurses' Aide	TOTAL
State Pen.																	x			x	x									x		x														x						x	7
Training Center			x	x															x		x								x	x		x					x						x									9
Lincoln (Neb.)				x	x					x		x								x					x						x												x			x						9
Clinton (N.Y.)						x																																											x				2
Elmira				x		x		x				x							x	x									x								x	x		x			x									12
Green Haven				x		x						x							x	x									x		x				x													x				9
Wallkill				x	x	x						x								x									x		x		x	x	x								x									11
Chillicothe (O.)												x							x	x												x			x																		5
Lebanon	x			x													x																			x		x						x	x						x		9
Marion			x	x				x																													x								x								5
So. O. Cor.																				x																x								x									3
State Ref.	x			x				x				x							x										x								x							x					x	x			10
State Cor. (Oreg.)			x	x	x	x		x	x							x			x	x	x				x	x				x									x		x								x	x			15
State Pen.				x	x							x					x		x	x																							x								x		8
Rockview (Pa.)			x		x	x		x				x				x			x			x	x		x			x		x							x	x						x	x		x						18
Camp Hill	x		x	x	x	x		x	x	x	x	x	x			x	x		x	x	x	x		x	x	x	x	x	x	x	x				x	x	x	x		x		x		x	x		x		x	x	x		39
Dallas	x	x	x	x	x			x		x		x	x			x					x	x		x		x	x		x	x	x				x	x				x			x	x	x			x		x			28
Graterford			x	x	x	x			x										x		x	x	x	x								x						x									x					12
Huntingdon		x	x	x	x	x	x	x	x	x	x	x				x			x		x	x		x		x	x	x	x	x	x				x	x	x			x		x		x	x		x	x		x		34
Pittsburgh	x		x	x	x	x	x	x	x	x		x				x											x	x	x	x	x				x	x		x		x		x		x			x					24
Reg. Cor.												x																																						x				2
Monroe (Wash.)			x	x	x	x						x							x	x							x	x		x	x										x											12
Shelton			x	x	x	x						x		x			x		x	x	x								x	x													x										13
Walla Walla			x	x																	x					x												x												x				6

APPENDIX II–Continued

VOCATIONAL PROGRAMS

FEMALE PRISONS	Air Cond. Rep.	Arts & Crafts	Auto Body	Auto Mech.	Baking	Barbering	Bookbinding	Brick Masonry	Build. Maint.	Build. Trades	Cabinet Making	Carpentry	Carpet Laying	Chemistry	Computer Maint.	Cooking	Data Proc.	Diving	Drafting	Electronics	Eng. & Appl. Rep.	Farming	Farm Equip.	Forestry	Furniture Mfr.	Graphics	Horticulture	Laundry	Leather Work	Machine Shop	Meat Cutting	Metal Work	Off. Mach. Rep.	Optics	Painting	Plumbing	Printing	Radio/TV Rep.	Recreation Aide	Silk Screening	Shoe Repair	Steam Fitting	Tailoring	Watch Repair	Welding	Clerical	Cosmetology	Dental Tech.	Floral Design	Food Service	Garment Mfr.	Housekeeping	IBM Keypunch	Nurses' Aide	TOTAL
Tutwiler (Ala.)																																															x							3
Cal. Inst. (Cal.)																																																			x		x			3
Niantic (Conn.)																																																		x		x			2
Dwight (Ill.)																																																		x					2
Women's Pris. (Ind.)																																																		x					2
Det. Cor. (Mich.)																																																		x					3
Women's Pris. (Minn.)																																																		x		x			3
Parchman (Miss.)																																																		x					1
Cor. Cent. (Mo.)																																																		x					3
York (Neb.)																																																		x					2
Bedford Hills (N.Y.)																																																		x		x			3
Women's Pris. (O.)																																																		x		x			3
Women's Cor. (Oreg.)																																																		x		x			6
Muncy (Pa.)																																																		x					2
Purdy (Wash.)																																																		x		x			3

Source: *Survey*, *supra* note 2.

APPENDIX III

INDUSTRIES

MALE PRISONS	Auto Rep.	Bookbindery	Cabinet Making	Cloth Mfr.	Coffee Roasting	Concrete	Dairy	Data Proc.	Dental	Detergent Mfr.	Farming	Flag Mfr.	Furniture Mfr.	Heavy Equip. Opr.	Library	License Plate	Machine Shop	Metal Shop	Printing	Road Sign Mfr.	Shoe Mfr.	Engine Rpr.	Tailoring	Twine Mfr.	Upholstery	Wax, Brush Mfr.	Canning	Food Service	Garment Mfr.	IBM Keypunch	Laundry	TOTAL
Frank Lee (Ala.)																																0
Atmore											x																					1
Draper											x																					1
Holman											x					x																2
Cal. Cor. (Cal.)												x																x				2
Cal. Inst.							x						x	x	x												x					5
Folsom																x		x														2
San Quentin										x			x						x														3
Cheshire (Conn.)	x															x			x	x												4
Osborn																																0
Somers								x					x						x	x		x							x			6
Menard (Ill.)			x		x						x														x	x			x			6
Pontiac																				x												1
Statesville		x								x			x					x											x			5
State Farm (Ind.)						x	x				x		x													x						5
State Prison										x						x		x		x		x							x			6
State Ref.												x	x					x	x	x									x			6
Ionia (Mich.)													x																x	x		3
Jackson																x	x	x			x								x			5
State Prison (Minn.)														x			x							x								3
State Ref.																x													x			2
Parchman (Miss.)		x																														1
Int. Ref. (Mo.)													x																			1
State Pen.										x	x		x			x		x		x	x								x		x	9
Training Center		x																x	x												x	4
Lincoln (Neb.)							x		x	x			x			x		x								x						7
Clinton (N.Y.)																					x								x			2
Elmira																																0
Green Haven													x																x			2
Wallkill																																0
Chillicothe (O.)											x	.	x	x					x													4
Lebanon																	x	x		x												3
Marion													x					x											x			3
So. O. Corr. Inst.																	x	x	x		x											4
State Ref.													x																x			2
State Cor. (Oreg.)																																0
State Pen.	x												x					x								x				x		5

APPENDIX III—Continued

MALE PRISONS	Auto Rep.	Bookbindery	Cabinet Making	Cloth Mfr.	Coffee Roasting	Concrete	Dairy	Data Proc.	Dental	Detergent Mfr.	Farming	Flag Mfr.	Furniture Mfr.	Heavy Equip. Opr.	Library	License Plate	Machine Shop	Metal Shop	Printing	Road Sign Mfr.	Shoe Mfr.	Engine Rpr.	Tailoring	Twine Mfr.	Upholstery	Wax, Brush Mfr.	Canning	Food Service	Garment Mfr.	IBM Keypunch	Laundry	TOTAL
Rockview (Pa.)											x																x			x	3
Camp Hill ♀					x						x			x																		3
Dallas	x						x																		x				x			4
Graterford	x	x	x								x									x									x	x		7
Huntingdon										x	x					x			x										x			5
Pittsburgh													x			x		x											x			4
Reg. Cor.																																0
Monroe (Wash.)							x						x						x							x			x			5
Shelton																										x						1
Walla Walla																x		x	x							x						4
FEMALE PRISONS																																
Tutwiler (Ala.)																											x		x		x	3
Cal. Inst. (Cal.)																													x			1
Niantic (Conn.)																														x		1
Dwight (Ill.)																															x	1
Women's Prison (Ind.)																															x	1
Det. Cor. (Mich.)																											x		x			2
Women's Prison (Minn.)																																0
Parchman (Miss.)																													x			1
Cor. Center (Mo.)																																0
York (Neb.)																													x			1
Bedford Hills (N.Y.)																											x	x			x	3
Women's Prison (O.)																													x	x		2
Women's Cor. (Oreg.)																																0
Muncy (Pa.)											x																			x		2
Purdy (Wash.)																																0

Source: *Survey, supra* note 2.